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PENDENT JURISDICTION: THE IMPACT OF HAGANS AND MOOR

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Since Chief Justice Marshall gave the doctrine of pendent jurisdiction its genesis in *Osborn v. Bank of the United States,*[1] the doctrine has been increasingly developed and expanded by the federal judiciary[2] and by Congress.[3] The doctrine's expansion began in *Siler v. Louisville & Nashville Railroad,*[4] wherein Justice

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[1]22 U.S. (9 Wheat.) 738, 823 (1824). The Supreme Court concluded that when a question to which the judicial power is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved. This statement has come to mean that a federal court has *power* to decide any question of state law necessary to the adjudication of a federal question. Professor Wright notes that functional justification of the *Osborn* rule finds support in the constitutional language of article III, section 2, which grants jurisdiction over "cases" rather than over "questions." *See* C. WRIGHT, LAW OF THE FEDERAL COURTS § 19, at 63 (2d ed. 1970). Consequently, in disposing of claims which are within a federal court's original subject matter jurisdiction, the court may exercise pendent jurisdiction over related claims of which it could not take cognizance if the related claims were independently presented. In other words, a federal court acquires jurisdiction over a case or controversy in its entirety.

[2]*See generally* United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Hurn v. Oursler, 289 U.S. 175 (1933); Siler v. Louisville & N.R.R., 213 U.S. 175 (1909).

[3]28 U.S.C. § 1338(b) (Supp. 1974) states:

> The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws.

[4]213 U.S. 175 (1909). In *Siler* a state order regulating rates was attacked as unauthorized by state law and as unconstitutional under federal law. Preferring to avoid a decision on the constitutional question, the Court held the state regulation invalid on state grounds. *Id.* at 191. The Court cautioned, however, that the federal question must not merely be colorable or fraudently set up for the purpose of acquiring federal jurisdiction. *Id.* at

Peckham held that when a good faith substantial federal question is presented, a federal court may dispose of the case on state grounds without deciding the federal question. Later, in *Hurn v. Oursler,*[5] the Court extended pendent jurisdiction to allow a federal court, purely for reasons of procedural convenience, to decide the state issue first. Although the *Hurn* doctrine was an attempted solution to the piece-meal litigation generated by the limited jurisdiction of the federal courts, the imprecision of *Hurn*'s "cause of action" standard created many difficulties in application.[6] The confusion arising from the *Hurn* standard was seemingly resolved by the United States Supreme Court in *United Mine Workers v. Gibbs.*[7] Justice Brennan, writing for a unanimous Court, discarded *Hurn*'s "cause of action" test and, instead, stated that pendent jurisdiction exists whenever the state and federal claims "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding."[8] Subsequent cases have generally

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192. *See* Pennsylvania Mutual Life Ins. Co. v. Austin, 168 U.S. 685, 695 (1897). It should be noted that under the *Siler* rule, federal courts need not first decide the federal issues but may resolve the case on state grounds; this is not a rule of necessity but one of judicial self-restraint. Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[5]289 U.S. 238 (1933). Plaintiffs alleged that defendant's play incorporated ideas from two plays written by them, only one of which had been copyrighted. *Hurn* reasoned that if a plaintiff presented "two distinct grounds," one state and one federal, in support of a single cause of action, the federal court had jurisdiction over the entire case. But if the plaintiffs' assertions amounted to "two separate and distinct causes of action," there was jurisdiction only over the federal cause. *Id.* at 245-46. In applying this standard, the Court held that the state law of unfair competition with regard to the copyrighted play was within the federal court's jurisdiction.

[6]*See* Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315 (1938); Note, *The Doctrine of* Hurn *and the New Judicial Code,* 37 IOWA L. REV. 406 (1952).

[7]383 U.S. 715 (1966). In *Gibbs,* members of a local union had forcibly prevented the opening of a mining operation with which plaintiff had a contract as a mining superintendent and hauling contractor. Gibbs sued the union in federal court and alleged that it had brought pressure on his employer to discharge him. He asserted both a federal claim under section 303 of the Taft-Hartley Act, 29 U.S.C. § 187 (1970), and a state claim of unlawful conspiracy to interfere with his employment contract.

[8]383 U.S. at 725. *Gibbs* concluded that *Hurn*'s approach was unnecessarily grudging. The standard enunciated in *Gibbs* resolved the question of judicial *power* to hear the claims. To be sure, *Gibbs* did not suggest that this power be exercised in every case; indeed, the Court carefully distinguished between the *power* to decide related claims and the discretionary *exercise* of that

read *Gibbs* as broadening the scope of pendent jurisdiction; commentators, however, have disagreed as to the desirability of this development.[9] Nevertheless, two important considerations have surfaced from the *Gibbs* decision. The first concerns the measure of caution with which federal courts should approach the exercise of pendent jurisdiction so as to avoid needless decisions of state law.[10] The second relates to whether pendent jurisdiction refers only to the joinder of state and federal claims when the same parties are involved or whether *Gibbs'* broad language includes the joinder of "pendent parties"[11] over whom the trial court has no independent jurisdiction.

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power. The discretion to hear the related claims depends on considerations of judicial economy, convenience, and fairness to litigants and should be used to avoid needless decisions of state law. Thus, it is clear that the discretionary inquiry is separate from the question of whether the court has jurisdiction to hear all claims. *Id.* at 726.

[9]*Compare* Note, UMW v. Gibbs *and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1969), *with* Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968).

[10]383 U.S. at 726. The argument in favor of great caution was based upon considerations of comity and the desire to avoid needless friction between the state and federal judiciaries in order to promote justice between the parties by procuring for them a more certain reading of applicable law. *Id.* Some courts and commentators have felt this consideration to be the principal argument against the exercise of pendent jurisdiction. *See* Shulman & Juegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L.J. 393, 408 (1936); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 232-33 (1948); Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018, 1043-44 (1962). *See also* Strachman v. Palmer, 177 F.2d 427, 431 (1st Cir. 1949) (Magruder, J., concurring).

[11]A pendent party is a party implicated in the litigation only with respect to a pendent claim and not with respect to any claim as to which there is an independent basis for federal jurisdiction. *See generally* Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 779 (1972); Fortune, *Pendent Jurisdiction—The Problem of "Pendenting Parties,"* 34 U. PITT. L. REV. 1 (1972); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968); Comment, *Federal Pendent Subject Matter Jurisdiction—The Doctrine of* United Mine Workers v. Gibbs *Extended to Persons Not Party to the Jurisdiction-Conferring Claim*, 73 COLUM. L. REV. 153 (1973); Note, UMW v. Gibbs *and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1969); Note, *The Federal Jurisdictional Amount Requirement and Joinder of Parties Under the Federal Rules of Civil Procedure*, 27 IND. L.J. 199 (1952); Note, *Pendent Jurisdiction: An Expanding Concept in Federal Court Jurisdiction*, 51 IOWA L. REV. 151, 162 (1965); Note, *Discretionary Factors in the Exercise of Pendent Jurisdiction: A Setback in the Second Circuit*, 64 NW. U.L. REV. 557, 563 (1969); Note, *The Municipality, Section 1983 and Pendent Jurisdiction*, 5 VALPARAISO U.L. REV. 110, 119 (1970).

Recently, the Supreme Court has been confronted with both issues. The Court has decided the issue of when a trial court may prefer to decide questions of state law,[12] but has not concluded the question of pendent parties.[13] In *Hagans v. Lavine,*[14] the Court discussed the federal courts' constitutional power to adjudicate pendent claims and the dependency of such power on the presence of a substantial jurisdiction-granting claim. Further, the Court examined the discretionary exercise of that power when the federal courts are confronted with the necessity of determining initially a state claim or a federal constitutional claim. The Court, in *Moor v. County of Alameda,*[15] discussed without deciding whether the federal judicial power extends to pendent claims involving pendent parties when the entire action before the court comprises but one constitutional case as defined in *Gibbs.*[16] *Moor*'s flirtation with the pendent parties concept was directed only to the power issue,[17] while, in *Hagans,* both the power and the discretionary exercise of that power were reexamined. This Article will explore the ramifications of these two current decisions and their impact upon the expansive jurisdiction of the federal courts.

I. Hagans: An Expansion of Gibbs?

The petitioners[18] in *Hagans* were recipients of public assistance under the federal-state Aid to Families with Dependent Children (AFDC) program.[19] The suit challenged a provision of

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[12]Hagans v. Lavine, 94 S. Ct. 1372 (1974).

[13]Moor v. County of Alameda, 411 U.S. 693 (1973), *noted in* 2 Fordham Urban L.J. 109 (1973).

[14]94 S. Ct. 1372 (1974). *Hagans* also presented the procedural problem as to when a three-judge court is to be convened pursuant to 28 U.S.C. § 2281 (1970) in the situation in which a single-judge district court initially determines the question of substantiality and then adjudicates a nonconstitutional claim.

[15]411 U.S. 693 (1973).

[16]*Id.* at 713.

[17]*Id.* The Court concluded that it was not appropriate to resolve the power dilemma since, even assuming arguendo the existence of power to hear the claim, the district court did not err as a matter of legitimate discretion in refusing to exercise pendent jurisdiction over the claims against Alameda County.

[18]Petitioners brought a class action on behalf of themselves and their infant children, and as representatives of other similarly situated AFDC recipients. 94 S. Ct. at 1375.

[19]42 U.S.C. §§ 601, 603, 604 (1970).

New York law permitting the state to recoup prior unscheduled rent payments from subsequent AFDC grants.[20] The recipients had received state funds over and above the usual monthly grants to prevent their evictions for nonpayment of rent. The state sought to recover these expenditures by reducing the petitioners' normal monthly grants over the succeeding months. Petitioners claimed[21] that the regulations allowing recoupment violated the fourteenth amendment's equal protection clause and contravened the Social Security Act, which governs AFDC benefits.[22] The equal protection claim alleged that the recoupment regulations discriminated against AFDC recipients who were potential victims of eviction by forcing them to live below the subsistence level provided to all other persons. These regulations, it was urged, applied a standard in determining petitioners' grant levels which was entirely different from the standard, based on income resources and exemptions from levy, applicable to all other persons.[23] The statutory challenge was that the state's recoupment plan was contrary to federal law because it was assumed, contrary to fact, that the funds extended to a recipient to satisfy a current emergency rent need would remain available to him as income during the six-month recoupment period.[24]

The district court found the equal protection claim substantial and held that the statutory-supremacy claim could properly be considered due to the doctrine of pendent jurisdiction. The court, after a hearing, declared the New York recoupment regulation contrary to federal law and enjoined its enforcement.[25] The

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[20]94 S. Ct. at 1376.

[21]Injunctive and declaratory relief was sought pursuant to 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 2201 (1970). Jurisdiction was invoked under 28 U.S.C. §§ 1343(3), (4) (1970). Originally, the petitioners sought to convene a three-judge court pursuant to 28 U.S.C. § 2281 (1970) to consider the constitutional claims, but withdrew the request. Pursuant to the parties' stipulation, the case was tried before a single judge on the issue of the claimed statutory conflict question only. 94 S. Ct. at 1393 n.11.

[22]42 U.S.C. §§ 602(a)(7), (10) (1970).

[23]94 S. Ct. at 1391 n.8.

[24]*Id.* at 1376 n.3.

[25]*Id.* at 1377. On appeal, the Court of Appeals for the Second Circuit found jurisdiction for the section 1983 action under 28 U.S.C. § 1343(3) (1970), but ordered a remand to the district court to determine whether the recoupment of prior advance rent payments from current grants was a "reduction in grant" which triggered the fair hearing procedures under New York statutory law. *See* Hagans v. Wyman, 462 F.2d 928 (2d Cir.

Court of Appeals for the Second Circuit, on the second appeal, reversed on the basis that the district court lacked jurisdiction to entertain the statutory claim because the constitutional claim was insubstantial.[26] The Supreme Court reversed the court of appeals and held that, since a substantial constitutional issue was pleaded under 42 U.S.C. section 1983, the district court properly invoked the doctrine of pendent jurisdiction in determining the nonconstitutional statutory-supremacy claim.[27]

A. Substantiality Doctrine—A Power Test

The threshold question presented to the *Hagans* Court concerned the application of the substantiality doctrine: was petitioners' equal protection claim challenging the state's recoupment regulation such a substantial constitutional claim under section 1983 as to confer jurisdiction on the district court to pass on it and the statutory-supremacy claim? Although the doctrine as a statement of jurisdictional principles affecting the power of a federal court to adjudicate constitutional claims had been criticized,[28] the Court in *Hagans* recognized the doctrine's authority and declined to disavow its application to petitioners' claims. Justice White, writing for the six-man majority, examined the historical development of the substantiality doctrine, which has legal signficance not only in regard to a pendent claim but also as to the potential jurisdiction under 28 U.S.C. section 2281 of a three-judge court.[29] The *Hagans* Court relied upon the construction of the doctrine as developed under section 2281. In that context, the Court cited the import of the doctrine to be that a claim will be constitutionally insubstantial only if prior decisions inescapably render the claim frivolous or so clearly unsound as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.[30] However,

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1972). On remand, the district court upheld its prior decision. 94 S. Ct. at 1377 n.4.

[26]Hagans v. Wyman, 471 F.2d 347 (2d Cir. 1973).

[27]94 S. Ct. at 1379.

[28]*See* Rosado v. Wyman, 397 U.S. 397, 404 (1970) (characterized as "more ancient than analytically sound"); Bell v. Hood, 327 U.S. 678, 683 (1946).

[29]28 U.S.C. § 2281 (1970).

[30]94 S. Ct. at 1379. *See Ex parte* Poresky, 290 U.S. 30, 32 (1933), *quoting from* Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910). *See also* Goosby v. Osser, 409 U.S. 512, 518 (1973); Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-06 (1933); McGilvra v. Ross, 215 U.S. 70, 80

previous decisions that merely render a claim doubtful or of questionable merit do not render it insubstantial for the purpose of invoking section 2281.[31]

Petitioners in *Hagans* had brought their suit under 42 U.S.C. section 1983[32] which authorizes a civil action to redress a deprivation, under color of any state regulation, of any right secured by the Constitution. Given the presence of a sufficient constitutional claim under section 1983 to support jurisdiction, section 1343(3)[33] would confer upon the district court jurisdiction to entertain the constitutional claim to which supremacy claims could append. The majority in *Hagans*, relying upon district court rulings on similarly drafted state recoupment provisions,[34] held that the equal protec-

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(1909). *Cf.* Bailey v. Patterson, 369 U.S. 31, 33 (1962); Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904).

[31] 94 S. Ct. at 1379, *quoting from* Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910).

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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

42 U.S.C. § 1983 (1970).

[33]

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

28 U.S.C. § 1343(3) (1970).

[34] Of the three district court opinions cited by the Court, all had determined that similarly drafted state recoupment provisions were not rationally related to the purpose of the AFDC program and were invalid. *See* Holloway v. Parham, 340 F. Supp. 336 (N.D. Ga. 1972) (equal protection and due process challenge to a state statute mandating recoupment from future grants for past unlawful payments held to be invalid after a determination that the claim was substantial enough to convene a three-judge court); Bradford v. Juras, 331 F. Supp. 167 (D. Ore. 1971) (district court held to have subject matter jurisdiction over a challenge to an Oregon regulation recouping overpayments from current grants); Cooper v. Laupheimer, 316 F. Supp. 264 (E.D. Pa. 1970) (upon holding equal protection claim substantial, court found

tion claim tendered by the petitioners was neither so frivolous nor so insubstantial as to be beyond the district court's jurisdiction.[35] The complaint, therefore, alleged a deprivation, under color of state law, of a constitutional right within sections 1983 and 1343(3). Further, the cause of action alleged was considered not so patently without merit as to justify a dismissal for want of jurisdiction whatever might be the ultimate decision on the merits of the federal claim.[36] The Court cited the admonition of *Bell v. Hood*[37] that jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which a litigant could actually recover, since failure to state a proper cause of action necessitates a judgment on the merits, not a dismissal for want of jurisdiction. *Bell* also warned that the question whether a complaint states a cause of action is one of law to be decided after, not before, the court assumes jurisdiction over the controversy.[38]

The dissenters in *Hagans* were unpersuaded.[39] Justice Powell concluded that the majority opinion was founded upon an error in the exercise of discretionary responsibility and, as such, unnecessarily extended *Gibbs* to "encompass matters of state law whenever an imaginative litigant can think up a federal claim, no matter how insubstantial, that is related to the transaction giving rise to the state claim."[40] Justice Powell's dissent was

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Pennsylvania recoupment statute invalid as inconsistent with the Social Security Act).

[35]94 S. Ct. at 1380.

[36]*Id.* at 1381. *See also* Oneida Indian Nation v. County of Oneida, 94 S. Ct. 772, 777 (1974).

[37]327 U.S. 678, 682 (1946).

[38]*Id.* The petitioners in *Bell* brought a suit to recover damages from agents of the Federal Bureau of Investigation. The complaint alleged jurisdiction founded upon federal questions arising under the Constitution or laws of the United States pursuant to 28 U.S.C. § 41(1) (1970). Petitioners claimed that damages were suffered as a result of the respondent agents' imprisoning the petitioners and subjecting their premises to search and their possessions to seizure in violation of the fourth and fifth amendments. The district court, sua sponte, dismissed the suit for want of jurisdiction on the ground that the action did not arise under the Constitution of the United States. The Ninth Circuit affirmed on the same ground. 150 F.2d 96 (9th Cir. 1945). The Supreme Court, in reversing, held that the district court had jurisdiction. 327 U.S. at 685. *See* Gully v. First Nat'l Bank, 299 U.S. 109, 112-13 (1936); Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199-200 (1920).

[39]Justices Rehnquist and Powell and Chief Justice Burger dissented.

[40]94 S. Ct. at 1386.

seemingly also directed at the substantiality doctrine's *power* test since he stated, without explanatory comment, that the jurisdiction-granting claim was a meritless constitutional claim.[41] Consequently, it is unclear whether the main thrust of his dissent was focused upon the court's jurisdiction, *i.e.*, power, or upon the court's discretionary exercise of that power.[42]

Justice Rehnquist's dissent, in which Justice Powell and Chief Justice Burger joined, was twofold. It was argued, first, that the equal protection claim was too insubstantial to establish jurisdiction under section 1343(3) and, secondly, that the doctrine of pendent jurisdiction was inappropriately invoked. A weighty argument, in the dissenters' view, was that the presence of federal questions should not induce federal courts to expand their limited jurisdiction.[43] It was urged that considerations of convenience and judicial economy might justify hearing claims when genuine federal questions, as contrasted with weak claims asserted only to secure jurisdiction, were before the court; however, the dis-

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[41] *Id.*

[42] Since Justice Powell also joined the dissent authored by Justice Rehnquist, one can assume that Justice Powell was concerned both with the substantiality of the equal protection claim upon which *jurisdiction* rested and the *appropriateness* of entertaining the pendent claims. *Accord*, Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-06 (1933) (the Court stated that "jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial").

[43] The dissenters recalled that Congress, by requiring a minimum dollar amount for federal question jurisdiction, 28 U.S.C. § 1331 (1970), made a legislative decision to leave certain claims solely to the state courts. 94 S. Ct. at 1390.

When Congress raised the jurisdictional amount to $10,000 in 1958, the stated purpose of the amendment was to

> make jurisdiction available in all *substantial* controversies where other elements of Federal Jurisdiction are present. The jurisdictional amount should not be so high to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies.

REPORT OF THE COMMITTEE ON JURISDICTION AND VENUE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, U.S. CODE CONG. & ADMIN. NEWS, 85th Cong., 2d Sess. 3101 (1958) (emphasis added). Recently, the Supreme Court announced in Snyder v. Harris, 394 U.S. 332, 339-40 (1969), that the congressional purpose was to check, to some degree, the rising caseload of the federal courts, especially with regard to the federal courts' diversity of citizenship jurisdiction. It should be noted that the doctrine of ancillary jurisdiction under diversity jurisdiction pursuant to 28 U.S.C. § 1332 (1970) is the corollary to the doctrine of pendent jurisdiction. *See* C. WRIGHT, *supra* note 1, § 9, at 19-21.

senters felt that such considerations ought to be subordinated to the policies of comity and federalism when the nonjurisdiction-granting pendent claims constitute the "real body" of the case.[44] A substantial federal claim was lacking, Justice Rehnquist concluded, because a "conceivable rational basis" existed for the state legislature to recoup the payments paid to petitioners over and above their normal monthly entitlement.[45] Justice Rehnquist found it necessary to distinguish or reconcile prior lower federal court decisions[46] which held that similar constitutional challenges to state welfare recoupment statutes were substantial. Justice Rehnquist cited *Levering & Garrigues Co. v. Morrin*[47] for the proposition that a claim is insubstantial when it is "obviously without merit."[48] However, the dissenters did not respond to the majority's application of the rule of *Ex parte Poresky*[49] and *Hannis Distilling Co. v. Baltimore*[50]—that claims are "constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous."[51]

B. Unanswered Jurisdictional Issues

At issue in *Hagans* was a pendent statutory-supremacy claim which involved an alleged conflict between a state regulation and federal law. In that respect, *Hagans* differed from *Gibbs*, which had dealt with federal jurisdiction over a *state* claim when the

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[44]94 S. Ct. at 1390. *See also* Younger v. Harris, 401 U.S. 37, 44 (1971) (discussion of current views relevant to comity and federalism).

[45]94 S. Ct. at 1392. The three-member dissent cited Dandridge v. Williams, 397 U.S. 471 (1970), to buttress its platitude that courts have largely discredited attacks on legislative decisions concerning the apportionment of limited state welfare funds. 94 S. Ct. at 1392. The majority responded, through Justice White, who was also in the majority in *Dandridge*, by axiomatically stating that *Dandridge* evinced no intention to suspend the operation of the equal protection clause in the field of social welfare. *Id.* at 1380.

[46]In passing, Justice Rehnquist dismissed the notion that Bradford v. Juras, 331 F. Supp. 167 (D. Ore. 1971), was persuasive in holding that a claim attacking a recoupment regulation came within sections 1983 and 1343(3), since the opinion did not elaborate on the court's reasons for so finding. The other cases cited by the majority in *Hagan* to support the existence of a jurisdictional prerequisite of substantiality were not discussed in the dissenting opinion. *See* cases cited note 34 *supra*.

[47]289 U.S. 103 (1933).

[48]94 S. Ct. at 1392.

[49]290 U.S. 30 (1934).

[50]216 U.S. 285 (1910).

[51]94 S. Ct. at 1379.

pendent claim constituted a matter of *state* law.[52] This did not cause the *Hagans* Court difficulty since it had earlier dealt with a similar pendent statutory-supremacy claim in *Rosado v. Wyman.*[53] In *Rosado,* a New York welfare regulation was challenged as being in conflict with the Social Security Act and the equal protection clause. The Court held that the district court had properly exercised pendent jurisdiction over the statutory claim. It was unnecessary, therefore, to determine whether the nonconstitutional statutory claim satisfied the jurisdictional amount requirement of section 1331 or qualified under section 1343(3).[54] The same issue confronted the Court in *Hagans,* that is, whether section 1343, wholly aside from the pendent jurisdiction rationale, could sustain jurisdiction to entertain and decide a supremacy or nonconstitutional statutory claim which alleged deprivation of rights. As in *Rosado,* this problematic jurisdictional issue was to remain unresolved.[55]

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[52]*See* Justice Powell's dissenting opinion in which this point is dicussed. 94 S. Ct. at 1386-87. *See also* C. WRIGHT, *supra* note 1, § 19, at 65.

[53]397 U.S. 397 (1970). A three-judge district court, pursuant to 28 U.S.C. § 2281 (1970), convened to adjudicate a constitutional challenge to provisions of New York's welfare law but dissolved itself when the constitutional claim became moot. The case was remanded to a single judge to consider a second nonconstitutional claim that the state welfare regulation was contrary to the Social Security Act. Justice Harlan, writing for the majority, emphasized that mootness, like insubstantiality, is not a threshold jurisdictional defect; as such, mootness did not affect the district court's constitutional *power* to hear the nonconstitutional claim. *Id.* at 404. *See* Hurn v. Oursler, 289 U.S. 238 (1933); Moore v. New York Cotton Exch., 270 U.S. 593 (1926). In short, mootness of the jurisdiction-conferring question is not a jurisdictional defect in a federal court's power to hear related pendent claims, whether statutory or state. 397 U.S. at 404.

[54]397 U.S. at 405 n.7. In Hague v. CIO, 307 U.S. 496, 518-32 (1939), Justice Stone articulated a distinction between those actions that may be commenced under section 1343(3), which requires no jurisdictional amount, and those that must be brought pursuant to section 1331 which requires that the jurisdictional amount be met. He concluded, in a separate opinion, that section 1343(3) includes suits in which the subject matter is one incapable of valuation, while resort to section 1331 must be had and the amount in controversy test satisfied when the party is claiming a property right that can be given a dollar amount. *Id.* at 530. *Contra,* Lynch v. Household Finance Corp., 405 U.S. 538 (1972). Justice Stewart, writing for the majority in *Lynch,* held that section 1343(3) is not limited to personal liberties, but includes property rights as well. *Lynch* expressly rejected Justice Stone's distinction. The Court reasoned that neither the language nor legislative history of section 1343(3) distinguished between personal and property rights. *Id.* at 542-43.

[55]94 S. Ct. at 1377 n.5. Section 1983 proscribes deprivation of rights, privileges, or immunities secured by the *Constitution and laws.* Section

Prior cases had suggested that a supremacy conflict question was itself a constitutional matter within the meaning of section 1343(3).[56] In *Swift v. Wickham,*[57] the Court recognized that "a suit to have a state statute declared void and to secure the benefits of a federal statute with which the state law is allegedly"[58] in conflict could not succeed unless there was ultimate resort to the Constitution's supremacy clause. Thus, petitioners in *Hagans* pleaded that the "secured by the Constitution" language of section 1343(3) should be construed to include supremacy clause claims. However, because the statutory supremacy claim was properly appendable to the equal protection claim's jurisdictional basis, the *Hagans* Court did not feel compelled to speak to that issue.

Similarly, petitioners urged that section 1983 authorized suits for vindication of rights under the "laws" of the United States and that their suit had been brought to vindicate statutory rights secured under the Social Security Act within the meaning of section 1343(4).[59] They contended that section 1343 should be construed to invest federal trial courts with jurisdiction to hear *any* suit authorized by 1983. Merely because prior decisions of the Court had either assumed that jurisdiction existed in welfare regulations suits under section 1343, or so stated without analysis, the *Hagans* Court refused to be bound by such conclusory findings. In none

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1343(3) vests jurisdiction in the district courts to redress deprivation of rights secured by the Constitution or by acts of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

[56]*See* Connecticut Union of Welfare Employees v. White, 55 F.R.D. 481, 486 (D. Conn. 1972). *But cf.* Swift & Co. v. Wickham, 382 U.S. 111 (1965), in which it was held that for purposes of applying the three-judge court statute, 28 U.S.C. § 2281 (1970), a supremacy conflict claim between federal and state law was not so substantial a constitutional claim as to require the invocation of a three-judge court.

[57]382 U.S. 111 (1965).

[58]*Id.* at 125. In Townsend v. Swank, 404 U.S. 282, 286 (1971), it was determined that AFDC laws, which are promulgated by state legislatures or agencies and which do not conform to federal HEW regulations or the Social Security Act, will be invalidated under the supremacy clause, U.S. CONST. art. VI, § 2.

[59]94 S. Ct. at 1377 n.5. *See also* Rosado v. Wyman, 397 U.S. 397, 405 n.7 (1970); King v. Smith, 392 U.S. 309, 312 n.3 (1968); Herzer, *Federal Jurisdiction Over Statutorily-Based Welfare Claims,* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 16-18 (1970); Note, *Federal Jurisdiction Over Challenges to State Welfare Programs,* 72 COLUM. L. REV. 1404, 1405-35 (1972); Note, *Federal Judicial Review of State Welfare Practices,* 67 COLUM. L. REV. 84, 109-15 (1967).

of the prior cases had the Court squarely faced these jurisdictional issues, nor did it squarely decide them in *Hagans*.[60]

Another procedural issue relevant to interpretation and application of section 2281 created discord in *Hagans*. Although petitioners had originally sought to convene a three-judge court to consider the equal protection claim, the case was tried before the single-judge district court on the statutory conflict question only.[61] The dissenters, believing that the main purpose of petitioners' equal protection claim was to secure jurisdiction for the more promising supremacy clause claim, asserted that the district court should have declined to exercise pendent jurisdiction over the supremacy claim and should have referred the equal protection claim to a three-judge court. The district court's failure to do so, they concluded, was an abuse of discretion under the *Gibbs* directive.[62]

As a matter of judicial convenience, time, and energy, the retention and decision of the statutory claim by the single-judge district court was viewed by the majority in *Hagans* as accurately reflecting the "recent evolution of three-judge court jurisprudence."[63] *Rosado* was instructive. In *Rosado*, the Court had cautioned that even if the constitutional claim had not been mooted, the most appropriate course might have been to remand to the

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[60] 94 S. Ct. at 1377 n.5.

[61] *Id.* at 1393 n.11. Congressional reaction to *Ex parte* Young, 209 U.S. 123 (1908), was one of the factors leading to the adoption of the three-judge court concept. *See* Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964); Note, *The Three-Judge District Court: Scope and Procedure under Section 2281*, 77 HARV. L. REV. 299 (1963); Note, *The Three-Judge District Court Reassessed: Changing Roles in Federal-State Relationships*, 72 YALE L.J. 1646 (1963). Since its adoption in 1910, the three-judge court statute has gone through several amendments. Today, for section 2281 to be applicable, a state statute or regulation must be under attack, a state officer must be a party defendant, and it must be alleged that the statute or regulation is violative of the United States Constitution. *See* Goosby v. Osser, 409 U.S. 512 (1973); Swift & Co. v. Wickham, 382 U.S. 111 (1965); Bailey v. Patterson, 369 U.S. 31 (1962).

[62] 94 S. Ct. at 1393. Under 28 U.S.C. § 1253 (1970), if the three-judge court had been convened, as the dissent contended should have occurred, and had decided the statutory claim, appeal would have been direct to the Supreme Court. But, because the single judge decided the pendent claim, appeal lay to the Court of Appeals.

[63] 94 S. Ct. at 1382. *See* Rosado v. Wyman, 397 U.S. 397 (1970); Swift & Co. v. Wickham, 382 U.S. 111 (1965). *But see* Brotherhood of Eng'rs v. Chicago R.I. & P.R.R., 382 U.S. 423 (1966); Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960).

single-judge district court for determination of the statutory claim, thereby conserving the time of two federal judges "at a time when district court calendars are overburdened."[64] It was, of course, clear that once the substantiality of the constitutional claim was established, if the single judge had rejected the statutory claim, a three-judge court would have been necessary to consider the constitutional issue. But to require a three-judge court to hear a claim, only to have it immediately sent back for adjudication of the statutory claim by the single-judge district court, was considered a grossly inefficient usage of judicial machinery, especially if it were apparent that the single judge's decision could resolve the case.

C. The Siler *Doctrine: Discretion to Avoid Needless Constitutional Decisionmaking*

Having crossed the hurdle of federal judicial power to invoke jurisdiction, the *Hagans* Court was compelled to reconcile the discretionary factors that predominate in pendent jurisdiction and constitutional construction. *Gibbs'* emphasis indicated that pendent jurisdiction is a matter of discretion, not of right.[65] Moreover, the exercise of that discretion is to be considered in light of the policy objectives underlying the doctrine. *Gibbs* instructed a court to utilize its power when judicial economy, convenience, and fairness to the litigants will be served. To be sure, the question of power will ordinarily be resolved by the pleadings, but the issue of discretion is one which remains open throughout the litigation. Warnings were sounded in *Gibbs* that federal courts ought to avoid needless decisions of state law; however, when a state claim is closely tied to questions of federal policy, the argument for exercise of pendent discretion is particularly strong.[66]

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[64]397 U.S. at 403. The controlling issue in *Rosado* was whether the mooting of the constitutional claim prior to decision by the three-judge court removed not only the obligation but destroyed the *power* of a federal court to adjudicate the pendent claim. It was held that the court retained *power* to adjudicate the pendent claim. The mootness consideration affected only discretion not power. *Id.* at 402-03.

[65]383 U.S. at 726.

[66]*Id.* at 727. The majority in *Hagans* stated that considerations of comity and the desirability of having a reliable and final determination of the state claim by state courts were wholly irrelevant when the pendent claim was federal rather than state. 94 S. Ct. at 1385. In Romero v. International Terminal Operating Co., 358 U.S. 354 (1959), a seaman filed suit in federal court claiming damages under the Jones Act, 46 U.S.C. § 688 (1970), and under general maritime law of the United States, for unseaworthiness of the ship, maintenance, cure, and negligence. It was held that

Pendent jurisdiction has been recognized to extend over federal claims which lack an independent jurisdictional basis as well as over state claims. The Court's members are not in disagreement over the application of the *Gibbs* rationale in either of these circumstances.[67] The dissenters in *Hagans* extolled the *Gibbs* admonition that pendent claims which substantially predominate over the jurisdiction-granting claim should be dismissed to avoid needless decisions and to avoid expanding federal jurisdiction.[68] Characterizing the pendent claims in *Hagans* as not meriting the federal court's time, the dissenters argued that the petitioners should have asserted their supremacy claim in a state court. Absent from the dissent's discretionary considerations was the *Gibbs* articulation that the need for the exercise of pendent jurisdiction is "particularly strong" when the pendent is closely tied to questions of federal policy.[69] Supremacy clause claims and Social Security Act interpretation can hardly be more closely tied to questions of federal policy. Unquestionably, federal courts have more familiarity and expertise with the controlling principles in a constitutional claim, even if denominated statutory, arising under the supremacy clause. The precedents of *King v. Smith*,[70] *Rosado*, and *Dandridge v. Williams*[71] all involved jurisdictional claims arising under the Constitution and pendent claims which raised statutory-supremacy issues. In each case, the Supreme Court decided the supremacy claim first without resort to the jurisdiction-granting constitutional claim. As Justice Harlan stated in *Rosado*, there are special reasons for the exercise of pendent jurisdiction when a supremacy clause claim is alleged, because the pendent statutory question is essentially one of federal policy and the federal courts are par-

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the district court had jurisdiction over the pendent maritime claims. The Court reasoned:

> Of course the considerations which call for the exercise of pendent jurisdiction of a state claim related to a pending federal cause of action within the appropriate scope of the doctrine are not the same when, as here, *what is involved are related claims based on the federal maritime law.* We perceive no barrier to the exercise of "pendent jurisdiction" in the very limited circumstances before us.

358 U.S. at 380-81 (emphasis added).

[67]94 S. Ct. at 1390.

[68]*Id.* at 1390 n.7.

[69]383 U.S. at 726.

[70]392 U.S. 309 (1967).

[71]397 U.S. 471 (1970).

ticularly appropriate bodies for the application of pre-emption principles.[72]

When confronted with the discretionary choice whether to adjudicate initially the constitutional issue or the pendent claim, most federal courts abstain on the former if the statutory or state claim is dispositive of the question. The Supreme Court in *Siler* announced the doctrine that as long as the federal question is not utilized as a mere vehicle to confer jurisdiction, a federal court has the power to decide all the questions in the case, even if it fails to resolve the federal issues and decides the case solely on the nonjurisdiction-granting claim.[73] The purpose of the *Siler* doctrine was to articulate that when a case can be decided without reference to questions arising under the Constitution, then that course should be pursued and not be abandoned without important reasons.[74] Cases since *Siler* have adhered to this discretionary doctrine of judicial restraint and have avoided constitutional adjudication when not absolutely essential to disposition of a case.[75]

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[72]397 U.S. at 404.

[73]213 U.S. at 191. The railroad had brought suit to enjoin the enforcement of a Kentucky railroad commission rate order which provided maximum rates on the transportation of commodities. The railroad contended that the rate order was unconstitutional, the rates being so low as to be confiscatory. Additionally, it was asserted that the rate order was in conflict with the commerce clause. The nonfederal claim asserted that the railroad commission lacked the power to make the rate order in question. *Id.* at 177. Ruling on the nonfederal claim, the *Siler* Court, after construing the state statute, held that the railroad commission had no authority to make the tariff rates. *Id.* at 198.

[74]*Id.* at 193. *See, e.g.*, Williamson v. United States, 207 U.S. 425 (1907); Burton v. United States, 196 U.S. 283, 295 (1904); Pennslyvania Mutual Life Ins. Co. v. Austin, 168 U.S. 685, 694 (1897); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 154 (1896); Horner v. United States, 143 U.S. 570, 576 (1891).

[75]*Accord,* Hillsborough v. Cromwell, 326 U.S. 620, 629 (1946); Cincinnati v. Vester, 281 U.S. 439, 448-49 (1930); Waggoner Estate v. Wichita County, 273 U.S. 113, 116-17 (1927); Chicago G.W.R.R. v. Kendall, 266 U.S. 94, 97-98 (1924); David v. Wallace, 257 U.S. 478, 482-85 (1922); Louisville & N.R.R. v. Greene, 244 U.S. 522, 527 (1917); Greene v. Louisville & Interurban R.R., 244 U.S. 499, 508-09 (1917); Ohio Tax Cases, 232 U.S. 576, 586-87 (1914); Louisville & N.R.R. v. Garrett, 231 U.S. 298, 303-04, 310 (1913); *cf.* Altantic Coast Line v. Daughton, 262 U.S. 413, 421-26 (1923); Southern R.R. v. Watts, 260 U.S. 519, 525-31 (1923). *But see* Sterling v. Constantin, 287 U.S. 378, 393-94, 396 (1932).

Probably the most celebrated opinion emulating the doctrine was authored by Justice Brandeis in Ashwander v. TVA, 297 U.S. 288 (1936) (Brandeis, J., concurring). Justice Brandeis artfully expressed the judicial self-limita-

The *Hagans* majority was mindful of the well-recognized *Siler* doctrine, but was challenged by the dissent for making a contemporary application of the *Siler* trappings to pendent jurisdiction since *Gibbs* had omitted citation to *Siler*. The majority did not interpret this omission as a purported rebuff to the doctrine's application or as an indication of a preference for pendent decisionmaking over constitutional decisionmaking,[76] since *Hurn* had earlier unmistakenly reaffirmed the *Siler* doctrine.[77] Moreover, the Court in *Gibbs* was not confronted with a constitutional jurisdiction-conferring claim. Nonetheless, the *Hagans* dissenters were unpersuaded that *Siler* had application when the constitutional claim was pleaded in order to confer jurisdiction. If *Siler* were applied in such a case, the pendent claim would become a preferred ground for decisionmaking only because the Court wished to avoid the claim over which Congress granted jurisdiction in the first place. Avoidance of a decision on the constitutional claim, it was feared, could itself become an independent basis for hearing the pendent claim.[78] In short, the dissent would have preferred to have the constitutional claim submitted to a three-judge district court in each instance rather than to have a single judge pass on the statutory pendent claim. It was argued that such a procedure would avoid expanding federal jurisdiction.

It is submitted that the dissent's analysis is improvident and untenable. First, it confused the power factor with discretionary factors; *Siler* only admonished against needless constitutional decisions in relation to the latter. The policy of avoiding a decision on the constitutional claim is not an independent jurisdictional basis for hearing the pendent claim. Rather, the jurisdictional basis for deciding the pendent claim depends upon the presence of a substantial constitutional claim. The concern that a colorable constitutional claim may confer jurisdiction should be directed to the power consideration of substantiality and not toward the consideration of discretion to exercise the power. In short, the dissenting opinion exhibits a dislike for the characterization of the

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tion by stating that the Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed. *Ashwander*'s authority was founded on *Siler*. For excellent critiques of Justice Brandeis' opinion, see A. Bickel, The Least Dangerous Branch 119, 144 (1962); P. Kurland, Felix Frankfurter on the Supreme Court 346, 349-51 (2d ed. 1970).

[76] 94 S. Ct. at 1384.

[77] *Id.* at 1384 n.13.

[78] *Id.* at 1388 n.4.

pleaded equal protection claim as sufficiently substantial to confer power on the trial court to dispose of the case by the exercise of discretionary considerations over the pendent claim. Secondly, the dissent would have the federal courts decide constitutional issues first and thereby avoid the exercise of discretion over pendent claims. This would establish a priority for constitutional decisonmaking and would abrogate the long-established *Siler* policy of judicial self-limitation. The result, of course, would be to increase colossally the use of three-judge district courts and the resort to constitutional decisionmaking.

II. Pendent Parties: The Courts of Appeal Favor Joinder

As has been noted previously, the *Gibbs* extension of pendent jurisdiction has attracted wide acceptance; it was hoped that the discretion reposed in federal courts would be exercised wisely to promote the just, speedy, and inexpensive determination of every action.[79] Following *Gibbs*, commentators,[80] and the majority of the circuit[81] and district[82] courts confronted with the issue of

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[79]3A J. Moore, Federal Practice ¶ 18.07 [1.-4], at 1952 (2d ed. 1974). *See* 6 C. Wright & A. Miller, Federal Practice and Procedure § 1585, at 800 (1971). *But cf.*, Shakman, *supra* note 11, at 286.

[80]*See* note 11 *supra.*

[81]Second Circuit: Astro-Honor, Inc. v. Grosset & Dunlop, Inc., 441 F.2d 627 (2d Cir. 1971); Leather's Best, Inc. v. The Mormaclynx, 451 F.2d 800, 809-10 (2d Cir. 1971); Almenares v. Wyman, 453 F.2d 1075, 1083-85 (2d Cir. 1971). Third Circuit: Nelson v. Keefer, 451 F.2d 289, 291 (3d Cir. 1971); Jacobson v. Atlantic City Hospital, 392 F.2d 149, 153-54 (3d Cir. 1968); Wilson v. American Chain & Cable Co., 364 F.2d 558, 564 (3d Cir. 1966); Borror v. Sharon Steel Co., 327 F.2d 165, 172-74 (3rd Cir. 1964). Fourth Circuit: Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); Rumbaugh v. Winifrede R.R., 331 F.2d 530 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964). Fifth Circuit: Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971); Connecticut Gen. Life Ins. v. Craton, 405 F.2d 41, 48 (5th Cir. 1968). Sixth Circuit: Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122, 1128 (6th Cir. 1970); F.C. Stiles Contracting Co. v. Home Ins. Co., 431 F.2d 917, 919-20 (6th Cir. 1970). *But cf.* Patrum v. City of Greensburg, 419 F.2d 1300, 1302 (6th Cir. 1969). Seventh Circuit: *Contra*, Wojtas v. Village of Niles, 334 F.2d 797 (7th Cir. 1964). Eighth Circuit: Hartridge v. Aetna Cas. & Sur. Co., 415 F.2d 809, 816-17 (8th Cir. 1969). Ninth Circuit: *Contra*, Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969); Williams v. United States, 405 F.2d 951, 955 (9th Cir. 1969).

[82]District courts favoring joinder of pendent parties include Eidschum v. Pierce, 335 F. Supp. 603, 609-10 (S.D. Iowa 1971); Thomas v. Old Forge Coal Co., 329 F. Supp. 1000 (M.D. Pa. 1971); Newman v. Freeman, 262 F. Supp. 106, 107-09 (E.D. Pa. 1966); Johns-Manville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905, 907-08 (N.D. Ill. 1966); Morris v. Gimbel Bros., 246 F. Supp. 984 (E.D. Pa. 1965).

joinder of parties suggested the acceptability of the joinder of additional parties implicated in the litigation only with respect to the pendent claim, but not as to any claim upon which there existed an independent basis of federal jurisdiction. The rule in favor of nonjoinder—either of the claim of an additional plaintiff against the defendant or of a separate claim against a new defendant—developed prior to *Gibbs*. This rule against joinder assumed that pendent jurisdiction was operative only with respect to the joinder of claims, an approach consistent with *Hurn*'s more restrictive *power* concept. A claim asserted by or against additional parties against whom there was no independent jurisdiction-granting claim would thus have been considered a separate cause of action under the *Hurn* test.[83]

Although *Gibbs* was not a case in which joinder of additional parties was at issue, there is dictum which suggests that the Supreme Court might sanction the liberalization of the nonjoinder approach. In *Gibbs*, Justice Brennan, using the Federal Rules of Civil Procedure as the standard, stated that the trend in the federal courts was "towards entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, *parties* and remedies is strongly encouraged . . . ."[84] Thus, a more expansive rule of joinder could apply to both federal question and diversity jurisdiction[85] as long as the claims derived from the same common nucleus of operative facts and would ordinarily have been expected to be tried in one proceeding. *Gibbs* seems to say that if this special relationship were met, power would be established in the federal court to join pendent parties

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District courts favoring nonjoinder include Ridden v. Cincinnati, Inc., 347 F. Supp. 1229, 1231 (N.D. Ga. 1972); Payne v. Mertens, 343 F. Supp. 1355, 1358 (N.D. Ga. 1972); Barrows v. Faulkner, 327 F. Supp. 1190 (N.D. Okla. 1971); Letmate v. Baltimore & O.R.R., 311 F. Supp. 1059, 1060-62 (D. Md. 1970); Tucker v. Shaw, 308 F. Supp. 1, 9-10 (E.D.N.Y. 1970); Hall v. Pacific Maritime Ass'n, 281 F. Supp. 54, 61 (N.D. Cal. 1968); Rosenthal & Rosenthal, Inc. v. Aetna Cas. & Sur. Co., 259 F. Supp. 624, 630-31 (S.D.N.Y. 1966).

[83]Comment, *Federal Pendent Subject Matter Jurisdiction*, *supra* note 12, at 155. *See* New Orleans Pub. Belt. R.R. v. Wallace, 173 F.2d 145 (5th Cir. 1949); Note, *Pendent Jurisdiction: An Expanding Concept in Federal Court Jurisdiction*, 51 IOWA L. REV. 151, 162 (1965).

[84]383 U.S. at 724 (emphasis added).

[85]However, if joinder of a nondiverse party to a pendent claim would defeat complete diversity, a preference for complete diversity should be maintained. *See, e.g.*, Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). *But cf.* 28 U.S.C. § 1335 (1970) (complete diversity is not required for statutory interpleader).

in the interest of exercising discretion in favor of judicial economy, convenience, and fairness.[86]

A. Moor*'s Flirtation with the Joinder of Pendent Parties*

In *Moor v. County of Alameda,*[87] the Court held that the district court had not erred as a matter of discretion in refusing to exercise pendent jurisdiction, but failed to resolve the question of whether the district court had the *power* to allow joinder of a party over whom there was no independent jurisdiction as to the pendent claim. Petitioners Moor and Rundle, pursuant to 42 U.S.C. sections 1983 and 1988,[88] commenced a suit for damages against Alameda County and its sheriff. A pendent state claim

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[86]One commentator has suggested that since pendent jurisdiction is a concept of subject matter jurisdiction over claims, not personal jurisdiction over parties, the court should concern itself with the relation of the jurisdiction-granting claim to the pendent claim. Fortune, *supra* note 11, at 5, 12. *But see* Robinson v. Penn Central Co., 484 F.2d 553, 555 (3d Cir. 1973), wherein the doctrine of pendent jurisdiction was applied in the personal jurisdiction context. *Robinson* considered the validity of service of process under extraterritorial service authorized by a federal statute for purposes of a pendent state claim. Judge Gibbons, speaking for the Third Circuit, noted that once a defendant is properly before the court by virtue of a federal extraterritorial service provision it does not offend due process that he has become subject to the court's ultimate judgment over pendent claims. *Contra,* Ratner v. Scientific Resources Corp., 53 F.R.D. 325, 328 (S.D. Fla. 1971).

Professor Fortune argues that when a court cannot fully adjudicate the claims over which it has jurisdiction, the court is compelled by considerations of judicial economy and fairness to join the additional parties. This follows the factors outlined in *Gibbs. Id.* at 12. *See also* Freeman v. Howe, 62 U.S. (24 How.) 450 (1860). Professor Fortune argues forcibly in favor of the joinder of claims against pendent parties in federal question cases but is against joinder in diversity jurisdiction cases when the jurisdiction results from the chance location of the parties' residence and when there is no presumption of special competency in the federal court over the issues to be tried. Given the vast experience acquired by the federal district courts under the *Erie* doctrine, Professor Fortune's concern for competence in interpreting state law claims seems less viable. In addition, why would a federal court be more competent to decide state law questions appended to federal question jurisdiction claims than to decide state claims joined to diversity jurisdiction claims?

The need for a state court to adjudicate the pendent claim is particularly encouraged if the state law issue is one of first impression. Wechsler, *supra* note 10, at 233.

[87]411 U.S. 693, 717 (1973).

[88]Jurisdiction was asserted under 28 U.S.C. § 1343 (1970). In petitioner's complaint, causes of action were asserted also under 42 U.S.C. §§ 1981, 1986 (1970), but these sections were not argued on appeal. 411 U.S. at 693 n.4.

was also filed under California's vicarious liability statute.[89] Petitioners argued that the district court had authority, under pendent jurisdiction, to hear the alleged state law claims against the County.[90] Relying on *Monroe v. Pape*,[91] which held that a municipality is not a "person" within the meaning of section 1983, the district court in *Moor* considered the civil rights claim barred and held that the County was not a "citizen" of California for purposes of diversity jurisdiction. Likewise, it held that it would be inappropriate to exercise pendent jurisdiction over the state claim for vicarious liability. The case was dismissed by the district court, and the dismissal was affirmed by the Ninth Circuit.[92] The dismissal was then reversed by the Supreme Court, which held that Alameda County possessed a sufficiently independent corporate character to be considered a citizen for purposes of diversity jurisdiction.[93] However, as to the joinder of pendent parties, the Court reasoned that, in view of the unsettled question of state law and the likelihood of jury confusion due to special defenses under California law, the district court did not abuse its discretion in refusing to hear the pendent claims.[94] If the sub-

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[89]California Tort Claim Act of 1963, CAL. GOVT. CODE § 815.2(a) (West 1963).

[90]Petitioner Moor alleged that, since he was a citizen of Illinois, diversity jurisdiction was present over the state law claim. Petitioner Rundle was a California citizen and thus was unable to assert jurisdiction based on diversity of citizenship. 411 U.S. at 696 n.4.

[91]365 U.S. 167, 187-91 (1961). In *Monroe*, the Court held that 42 U.S.C. § 1983 was intended to provide private parties a cause of action for abuse of official authority which resulted in the deprivation of constitutional rights.

[92]458 F.2d 1217 (9th Cir. 1972), *aff'g*, 331 F. Supp. 492 (N.D. Cal. 1971). *Moor* and *Rundle* were consolidated for purposes of appeal.

[93]The *Moor* decision effectively reverses earlier Ninth Circuit decisional law holding that counties were not citizens for diversity purposes. *See* Miller v. County of Los Angeles, 341 F.2d 964 (9th Cir. 1965); Lowe v. Manhattan Beach City School Dist., 222 F.2d 258 (9th Cir. 1955).

There was no doubt that a state is not a citizen for purposes of diversity jurisdiction. *See* Minnesota v. Northern Sec. Co., 194 U.S. 48, 63 (1904); Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894). However, a political subdivision of a state is a citizen for diversity purposes unless it is the arm or alter ego of the state. *See* Bullard v. City of Cisco, 290 U.S. 179 (1933); Loeb v. Columbia Township Trustees, 179 U.S. 472, 485-86 (1900); Chicot County v. Sherwood, 148 U.S. 529, 533-34 (1893); Lincoln County v. Luning, 133 U.S. 529 (1890); Cowles v. Mercer, 74 U.S. (7 Wall.) 118 (1869).

[94]411 U.S. at 716. Since *Moor* also held that Alameda County was a citizen of California for purposes of diversity jurisdiction, the state law claim against the County for vicarious liability was before the district court on remand. *Id.* at n.36.

stantial element of discretion, inherent as it is in the doctrine of pendent jurisdiction, had been exercised in favor of joinder, the County could have been brought in as an additional defendant.[95]

In *Moor,* both the district court and the Ninth Circuit ruled that the exercise of pendent jurisdiction was inappropriate as a matter of both judicial *power* and *discretion.*[96] Although the Supreme Court concluded that it was inappropriate to resolve the power issue since the state claim was assertable under diversity jurisdiction, Justice Marshall, writing for the majority, suggested that the joinder of pendent parties might be an acceptable extension of *Gibbs.* The Court was mindful of the *Gibbs* power test —that a federal court has jurisdiction if a substantial federal claim and the pendent claim derive from a common nucleus of operative facts and ordinarily would be expected to be tried in one proceeding—and stated that petitioners' complaints alleged substantial federal causes of action. It was noted, moreover, that there was no dispute as to whether the federal and state claims could be said to have involved "a common nucleus of operative fact."[97] These statements are characteristically similar to a finding, pursuant to the *Gibbs* power test, that power did exist to join these claims even though it would have constituted the joinder of pendent parties over which there existed no independent jurisdiction. In addition, it must be remembered that *Gibbs* proclaimed that joinder of claims, parties, and remedies is strongly encouraged,[98] particularly when important federal interests, such as civil rights, are involved. Retention of jurisdiction over state tort claims appended to a civil rights claim might have the effect of giving greater impetus to the federal policy.

B. Liberalized Joinder: Analogues to the Federal Rules of Civil Procedure

Moor acknowledged that the exercise of federal jurisdiction over claims against parties over whom no independent federal jurisdiction existed was analogous to joinder of new parties under ancillary jurisdiction in the context of compulsory counterclaims and third party claims under rules 13(a), 13(h), and 14(a) of

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[95]The County was not directly suable in federal court, at least by petitioner Rundle, since the requisite diversity would have been lacking.

[96]94 S. Ct. at 713.

[97]*Id.* at 712.

[98]383 U.S. at 724.

the Federal Rules of Civil Procedure.[99] *Gibbs* also had relied on the joinder rules to support pendent jurisdiction.[100] District courts were authorized to utilize the doctrine if "considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding . . . ."[101]

The early leading case in the expansion of federal jurisdiction was *Moore v. New York Cotton Exchange*,[102] in which the Court upheld federal jurisdiction over a defendant's state law counterclaim. Plaintiff alleged that the defendant cotton exchange had monopolized the cotton price quotations in violation of antitrust laws. The defendant's counterclaim against the company, of which Moore was president, alleged that, in obtaining the quotations, the company had violated a state law. The counterclaim lacked independent jurisdiction and could not have been brought in the federal court absent *Moore*'s "transaction or occurrence" test.[103]

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[99]411 U.S. at 714-15. *See* FED. R. CIV. P. 13(a), 13(h), 14, 18-21. Cases relevant to compulsory counterclaim and joinder are: H.L. Peterson Co. v. Applewhite, 383 F.2d 430, 433-34 (5th Cir. 1967); Albright v. Grates, 362 F.2d 928 (9th Cir. 1966); Union Paving Co. v. Downer Corp., 276 F.2d 468, 471 (9th Cir. 1960); United Artists Corp. v. Masterpiece Prod., Inc., 221 F.2d 213, 216-17 (2d Cir. 1955); Markus v. Dillinger, 191 F. Supp. 732, 735 (E.D. Pa. 1961). *Cf.* Dewey v. West Fairmont Gas Coal Co., 123 U.S. 329 (1887); Moore v. New York Cotton Exchange, 270 U.S. 593, 608-09 (1926). Cases relevant to third-party claims are as follows: Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843, 844 (3d Cir. 1962); Southern Milling Co. v. United States, 270 F.2d 80, 84 (5th Cir. 1959); Dery v. Wyer, 265 F.2d 804, 807-08 (2d Cir. 1959); Waylander-Peterson Co. v. Great Northern R.R., 201 F.2d 408, 415 (8th Cir. 1953). *See also* 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 424 (C. Wright ed. 1961).

[100]383 U.S. at 724-25.

[101]*Id.* at 725. *Gibbs* cited FED. R. CIV. P. 2, 18-20, and 42 for the proposition that the rules tend toward the broadest possible scope of action in which the joinder of claims, parties, and remedies is strongly encouraged. 383 U.S. at 724 n.10.

[102]270 U.S. 593 (1926). The defendant was exonerated at the trial for the alleged antitrust violation and received a judgment on the state counterclaim. The Supreme Court affirmed on both issues. Authorization for deciding the state law claim was pursuant to Equity Rule 30, rule 13's predecessor.

[103]

> Two classes of counterclaims thus are provided for: (a) one "arising out of the transaction which is the subject matter of the suit," which must be pleaded, and (b) another "which might be the subject of an independent suit in equity" and which may be brought forward at the option of the defendant. We are of the opinion that this counterclaim comes within the first branch of the rule . . . .

Moore's formulation was cited by the Supreme Court in *Hurn*, and again in *Moor*,[104] as a substantial source of pendent jurisdiction.

Rule 13(a) states that a counterclaim must be alleged in the pleading if, at the time of the pleading, the pleader has a claim against any opposing party and it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim.[105] Rule 13(h) permits persons other than those made parties to the original action to be made parties to a counterclaim or cross-claim in accordance with rules 19 and 20.[106] The *raison d'etre* of rule 13 is to allow claims to be joined in order to expedite

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> The bill sets forth the contract with the Western Union and the refusal of the New York exchange to allow appellant to receive the continuous cotton quotations, and asks a mandatory injunction to compel appellees to furnish them. The answer admits the refusal and justifies it. The counterclaim sets up that, nevertheless, appellant is purloining or otherwise illegally obtaining them and asks that this practice be enjoined. "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject-matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations, as, for example, that appellant is unlawfully getting the quotations, does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim.

270 U.S. at 609-10.

[104]411 U.S. at 715 & n.31. The American Law Institute has suggested that the *Moore* test should be incorporated in its proposed section 1313(a), since it is also consistent with *Gibbs*. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 207-12 (1969). *Contra*, Shakman, *supra* note 11, at 272. Shakman is critical of the broad standard of pendent jurisdiction announced in *Gibbs* because it would place many cases in the federal courts that would otherwise be decided in state court. This in turn would reduce the concurrent jurisdiction of the state courts over most federal law questions and would divert state law questions from the state court having the greater interest in and knowledge of such inquiries. *Id.* at 286.

[105]6 C. WRIGHT & A. MILLER, *supra* note 79, §§ 1409-19.

[106]*Id.* §§ 1434-36.

the resolution of all controversies between the parties in one suit.[107] However, rule 13(h) only authorizes a court to join additional persons in order to adjudicate a counterclaim or cross-claim that already is before the court or one that is being asserted at the same time as the joinder of the additional party is sought.[108] Persons brought into an action under rule 13(h) as parties to a compulsory counterclaim will come within the ancillary subject matter jurisdiction of the court.[109] Since the compulsory counterclaim must involve the same transaction or occurrence as the original action, it is, by definition, closely related to the jurisdiction-granting claim. The joinder of the party will be without regard to citizenship, and his joinder will not be deemed to destroy the jurisdiction of the court. The purposes of ancillary and pendent jurisdiction, and the liberal joinder policy of rule 13, are in accord that as many related claims as possible should be settled within the scope of a single action.[110] Arguably, the *Gibbs* power test, which focuses upon claims deriving from the same common nucleus of operative facts, is characteristically similar to the transaction or occurrence consideration under rule 13. Each approach directs the courts to concern themselves with the relationships of the claims to each other, irrespective of the joinder of parties, at least with regard to whether judicial power exists to join the claims. Once judicial power is established, the question remaining is whether the discretionary exercise of that power would further economy, convenience, or fairness to the litigants—considerations not unlike those that buttress rule 13(h).

Support for joinder is also present, by analogy, in rule 14(a), which allows the impleading of a third-party defendant who may be liable to the defendant for all or part of the plaintiff's claim. The great weight of authority agrees that impleader does not create subject matter jurisdiction problems because ancillary jurisdiction,

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[107] *Id.* § 1403, at 13.

[108] *Id.* § 1435, at 188. This is not to be confused with rule 14 which exclusively concerns the addition of third parties who may be liable to the defendant third-party plaintiff for part or all of the damages claimed by the original plaintiff. Under rule 14, moreover, additional parties may be added for the purpose of asserting a new claim that may not be related to the original claim.

[109] 6 C. WRIGHT & A. MILLER, *supra* note 79, § 1436, at 191-92.

[110] But, a different result may be reached in a diversity action when there is an attempt to add parties to adjudicate a permissive counterclaim under rule 13(h). If diversity will be destroyed, joinder will not be permitted since a permissive counterclaim does not arise out of the same transaction or occurrence, and therefore cannot be ancillary or pendent. *Id.* § 1436, at 192-93.

which is independent of rules governing third-party practice, authorizes the joinder of the third-party defendant.[111] The Second Circuit noted this in *Dery v. Wyer*,[112] and observed that rule 14 does not extend jurisdiction but merely sanctions an impleader procedure which rests upon the broad conception that a claim is comprised of a set of facts giving rise to rights flowing both to and from a defendant. Indeed, rule 82 provides expressly that the rules shall not extend or limit the court's jurisdiction. One district court has reasoned that the ancillary nature of the claim is not to be determined by whether the pleader must or may assert a claim under rules 13 and 14, but is to be determined by considering the relationship of the claim to the transaction that is the subject of the main suit.[113] In sum, under rule 14, if a defendant's right of action against a third-party defendant is based on the same aggregate of facts that constitute plaintiff's claim, the court has ancillary power to adjudicate the third-party claim, because it has subject matter jurisdiction over the plaintiff's claim.[114] Therefore, no independent jurisdictional basis is required if diversity of citizenship or federal question jurisdiction exists between the original parties.

It has been suggested by Professor Moore that the post-*Gibbs* standard of joinder should be one of convenience, similar to the standard in rules 18 to 20 for joinder of claims and parties.[115] Rule 18(a) states that a party asserting a claim for relief may join, either independently or in the alternative, as many claims, legal, equitable, or maritime, as it has against an opposing party.[116] Unlike the original rule,[117] rule 18(a) permits the joinder of claims

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[111]*See, e.g.*, Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959); Sheppard v. Atlantic States Gas Co., 167 F.2d 841, 845 (3d Cir. 1948); Williams v. Keyes, 125 F.2d 208 (5th Cir.), *cert. denied*, 316 U.S. 699 (1942); 1 W. BARRON & A. HOLTZOFF, *supra* note 99, § 424; 3 J. MOORE, *supra* note 79, ¶ 14.26; 6 C. WRIGHT & A. MILLER, *supra* note 79, § 1444.

[112]265 F.2d 804, 808 (2d Cir. 1959).

[113]Heintz & Co. v. Provident Tradesmens Bank & Trust Co., 30 F.R.D. 171, 173-74 (E.D. Pa. 1902).

[114]United States v. Joe Grasso & Son, 380 F.2d 749 (5th Cir. 1967); Dery v. Wyer, 265 F.2d 804, 807 (2d Cir. 1959).

[115]*See* 3A J. MOORE, *supra* note 79, ¶ 18.07[1.-4].

[116]This applies only to the joinder of claims.

[117]Rule 18(a) as originally promulgated in 1937 did not authorize unlimited joinder of claims but was subject to the rules on parties. Joinder under the original rule was held permissible if, under rule 20(d), the claims arose out of the same transaction, occurrence, or series of transactions or

of multiple parties once the parties are properly joined even though the claims arise from distinct transactions and do not involve questions of law or fact common to all the parties. Rule 18(a) only deals with joinder of claims during the pleading stage and not as a matter of trial convenience. Under rule 42(b) the court is given discretion to order separate trials of claims or issues. If the pendent claim and the additional party would complicate issues, rule 42(b)'s provision for separate jury trial or severance under rule 21(h) is available. Neither rule, however, affects the court's power to join claims or parties. Therefore, there are no restrictions, other than the requirements of subject matter jurisdiction, on claims—be they original claims, counterclaims, cross-claims, or third-party claims—that may be joined in actions brought in federal court. The permissive joinder of parties under rule 20(a) operates independently of rule 18(a). After the parties are properly joined under rule 20(a)[118] as to one claim, additional claims, related or unrelated, may be joined even if against fewer than all the parties. Rule 20(a) instructs that a party may properly join any other party only if the claims against the joined party arise out of the same transaction or occurrence or involve a common question of law or fact. Hence, it is clear that the rule 20(a) "same transaction and common question of law and fact" test does not limit the claims assertable under rule 18(a). Conversely, rule 18(a)'s joinder of claims test in no way restricts joinder of parties rule 20(a).

Rule 82 provides that the Federal Rules of Civil Procedure shall not be construed to extend or limit the federal court's juris-

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occurrences and there was a common question of law or fact. Federal Housing Administration v. Christianson, 26 F. Supp. 419 (D. Conn. 1939). *See* Advisory Committee Note, 39 F.R.D. 86-87 (1966).

The 1966 amendment was intended to overrule *Christianson* and make clear that a properly joined party asserting a claim might join as many additional claims as he has against an opposing properly joined party. 3A J. MOORE, *supra* note 79, ¶ 18.04 [3.-2].

[118]Consider also rule 19 which provides for joinder of indispensable parties who are subject to service of process. Such parties *shall* be joined if: (1) complete relief cannot be accorded those already parties, (2) the indispensable party claims an interest relating to the subject of the action and failure to join may impair his ability to protect his interest, or (3) failure to join may leave any party to the suit subject to a substantial risk of incurring multiple or inconsistent obligations. FED. R. CIV. P. 19(a). Failure to join an indispensable party permits the court to order: (1) that the party be added if he is subject to process, (2) that the action be dismissed, or (3) that the action be allowed to continue in his absence. *See* 7 C. WRIGHT & A. MILLER, *supra* note 79, § 1604, at 35. After the indispensable party is

diction.[119] Since the original parties and claims give the trial court subject matter jurisdiction over the case or controversy in its entirety, decisional law is clear that the court's disposition of nonjurisdictional related claims is ancillary or pendent to its powers to resolve the whole of the controversy. The liberal joinder rules countenance this sound judicial policy. It cannot be argued, therefore, that the use of the joinder rules to join pendent parties is an extension of jurisdiction; the courts' ancillary or pendent jurisdiction already extends over the claims relevant to the pendent parties. To argue otherwise would be to limit both the rules of joinder and the courts' jurisdiction in contravention of the rule 82 mandate.

C. Circuit Law Governing Joinder of Pendent Parties: Illustrative Cases

The recent trend in the federal courts is to favor joinder of pendent parties. Some earlier authority had suggested that the doctrine of pendent jurisdiction applied only if the same parties were involved in both the federal and state claims.[120] Since this authority largely relied on a pre-*Gibbs* standard, it is suspect today. The Seventh and Ninth Circuits are the leaders militating against the view that pendent or ancillary jurisdiction is expansive enough to allow joinder of pendent parties when independent jurisdiction is absent over the claim against or on behalf of the pendent party. A reading of the decisional law makes it clear that the circuit courts are not determining the permissibility of joinder on the basis of whether or not the main claim is based on diversity of citizenship jurisdiction or federal question jurisdiction.[121]

The Seventh Circuit in *Wojtas v. Village of Niles*,[122] an action brought against police officers under the federal civil rights statutes and against the Village for false arrest and false imprisonment under state law, held that the district court lacked

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joined pursuant to rule 19, rule 18(a) permits additional claims, whether related or not, to be asserted against any or all parties.

[119]Venue and personal jurisdiction over the defendants must still be satisfied.

[120]*See* Wojtas v. Village of Niles, 334 F.2d 797 (7th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965); Kataoka v. May Dep't Stores Co., 115 F.2d 521 (9th Cir. 1940).

[121]*But see* Fortune, *supra* note 11, wherein the author argues that the distinction should be made. *See* note 86 *supra*.

[122]334 F.2d 797 (7th Cir. 1964). *See also* Fields v. Fidelity Gen. Ins. Co., 454 F.2d 682 (7th Cir. 1971) (no abuse of discretion to dismiss pendent state claims in an action alleging, inter alia, violation of federal security law).

jurisdiction over the claims against the Village. The court applied the *Hurn* "cause of action" test. Since both diversity and federal question jurisdiction were lacking over the state tort claims, extension of pendent jurisdiction over these nonjurisdictional claims would have required joinder of the pendent party, the Village of Niles. Under the narrow "cause of action" test announced in *Hurn*, a determination of lack of jurisdiction was a logical result. But, given *Gibbs'* broader pendent power test and the joinder provisions of the rules, it was a questionable holding.

The Ninth Circuit, in cases decided since *Wojtas*, has likewise concluded that federal courts lack the power to entertain pendent claims over pendent parties. In *Hymer v. Chai*,[123] a diversity suit, a motorcyclist brought personal injury and property damage claims against a motorist in connection with an intersection collision. The wife of the plaintiff motorcyclist filed a claim for loss of consortium. The *Hymer* court, in refusing to apply the pendent or ancillary jurisdiction concept, held that the trial court lacked jurisdiction over Mrs. Chai's claim because it did not meet the jurisdictional amount required by 28 U.S.C. section 1332(a). Pendent jurisdiction, said the court in *Hymer*, had as its object joinder of claims, not joinder of parties; it was not designed to permit a party without a federally cognizable claim to invoke federal jurisdiction by joining a different party plaintiff who would assert an independent federal claim growing out of the same operative facts.[124] For these propositions, Judge Hufstedler, writing for the court, cited two pre-*Gibbs* cases, *Hurn* and *Kataoka v. May Department Stores Co.*[125] The *Hymer* court reasoned that it was bound by *Kataoka*, a case decided twenty-nine years before *Gibbs*, and the narrow limits of pendent jurisdiction advanced therein.

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[123]407 F.2d 136 (9th Cir. 1969).

[124]*Id.* at 137.

[125]115 F.2d 521 (9th Cir. 1940). In *Kataoka*, a negligence suit was brought against a corporation and an employee, jointly and severally, as joint tort-feasors. Plaintiff's finger had been injured in defendant's department store escalator and it was clipped off when Goddard, an agent of the department store, attempted to free the finger. The parties' basis for being in federal court was diversity. However, diversity was lacking because Goddard, characterized as the real party defendant, and the plaintiff were citizens of the same state. *Id.* at 522. The court relied upon *Hurn*, and held that pendent jurisdiction was inapplicable.

Section 1301(e) of the 1969 ALI study would codify the pendent jurisdiction principles but only in diversity cases in which the plaintiff invoking jurisdiction is not a citizen of the state where the action was commenced.

The Ninth Circuit has applied the same reasoning to a state claim appended to a federal tort claim. The plaintiff in *Williams v. United States*[126] brought an action for damages for injuries suffered while he was a federal prisoner housed in a county jail. The district court dismissed claims against the individual defendants, who were state or county employees, because no independent jurisdictional ground was pleaded. This occurred after the federal claims were dismissed on procedural considerations. The Ninth Circuit held that under the circumstances the district court did not abuse its discretion in not exercising power to entertain the state claims.[127]

Writing for the Eighth Circuit in *Hartridge v. Aetna Casualty & Surety Co.*,[128] Judge (now Justice) Blackmun criticized the Ninth Circuit's restrictive approach in *Hymer*. *Hartridge* was a diversity action concerning the liability of an insurer for injuries sustained when a bus overturned. Plaintiff's wife asserted a claim for loss of consortium. The court held that, although *Gibbs* concerned claims possessed by a single plaintiff, the decision clearly indicated that "there is power in federal courts to hear the whole."[129] After deciding that the joinder of the pendent party's claim came within the *Gibbs* power test, the court asserted that such a policy of joinder avoided forum shopping and multiple actions, tended to reduce costs for litigants, and avoided the waste of already heavily burdened judicial time.[130] These policy considerations underscored the need for a broad reading of the *Gibbs* pendent discretion criteria.

A distinction in approach is apparent in *Wojtas*, *Hymer*, and *Williams*. *Wojtas* and *Hymer* addressed the critical issue of judicial power, while *Williams* was concerned with whether there was an abuse of discretion in not exercising that power. *Wojtas*, a pre-

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See ALI, *supra* note 104, §§ 1301(e), 1302. This could not have aided Mrs. Chai because she was a resident of Hawaii. 407 F.2d at 138 n.6.

[126]405 F.2d 951, 955 (9th Cir. 1969); Federal Tort Claim Act, 28 U.S.C. § 2674 (1970), 28 U.S.C. § 1346 (1970). It was alleged that all the named defendants, the County of San Diego, members of the Board of Supervisors, and the sheriff, owed a duty to plaintiff under 18 U.S.C. § 4042 (1970), as it defines the duties of the Bureau of Prisons.

[127]*Id.* at 955. *See also* Sykes v. United States, 290 F.2d 555, 556 (9th Cir. 1961).

[128]415 F.2d 809, 816-17 (8th Cir. 1969).

[129]*Id.* at 816. *See also* Morris v. Gimbel Bros., 246 F. Supp. 984 (E.D. Pa. 1965) (involving a claim for loss of consortium).

[130]*Id.* at 817.

Gibbs case, and *Hymer*, a post-*Gibbs* case, stand alone against the *Gibbs* trend which recognizes the existence of judicial power to hear pendent claims involving pendent parties when the entire action before the court comprises but one constitutional case as defined by *Gibbs*.[131] It is obvious from the Supreme Court's calculated caution in *Moor* that the federal courts might avoid a direct ruling on the power issue by merely assuming the existence of power to hear the claim and then declining to exercise discretion to invoke the power. This manner of procedure would rarely give rise to a finding of reversible error since the trial court has substantial discretion and rarely will be held to have abused it. Because the *Gibbs* directives relevant to discretion—judicial economy, convenience, and fairness to the litigants—are so pervasive, few courts will be reversed for an abuse of discretion for refusal to entertain the pendent claims. This is clear even in those circuits in which it has been held that judicial power exists to adjudicate pendent claims over pendent parties.[132]

Some of the early cases which considered the proper coordination of diversity and federal question jurisdictional requirements with the provisions of the Federal Rules of Civil Procedure favoring liberal joinder of claims and parties were labor law decisions of the Fourth and Fifth Circuits. The plaintiff in *Rumbaugh v. Winifrede Railroad*[133] was a discharged railroad employee who brought a claim for breach of the duty of fair representation against the union, a claim of wrongful discharge against the employer, and a claim alleging conspiracy in the procurement of his discharge by the union. The Fourth Circuit, in a pre-*Gibbs* decision, held that the alleged breach of the union's duty of fair representation presented a substantial claim arising under federal law, and thus, assumption of pendent jurisdiction over the em-

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[131] 411 U.S. at 713.

[132] *See* Patrum v. City of Greensburg, 419 F.2d 1300, 1302 (6th Cir. 1969) (action brought against a policeman and the city to recover for illegal arrest and beating). The Sixth Circuit has held that judicial power exists to join claims when pendent parties assert nonjurisdictional granting claims. *See* Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122 (6th Cir. 1960) (affirming the district court in asserting pendent jurisdiction over twenty-four defendants whose claims against insurer for business losses resulting from a fire were less than the $10,000 jurisdictional amount). *See, e.g.*, F.C. Stiles Contracting Co. v. Home Ins. Co., 431 F.2d 917 (6th Cir. 1970).

[133] 331 F.2d 530 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964). Jurisdiction was under the Railway Labor Act § 151, 45 U.S.C. § 151 *et seq.* (1970) and 28 U.S.C. § 1331 (1970). The district court dismissed the complaint for lack of subject matter jurisdiction.

ployee's nonfederal claims of wrongful discharge was proper.[134] Although no independent jurisdiction over the employer for the state claim of wrongful discharge was alleged, it was held that the pendent claim permitted joinder of the employer within the court's pendent jurisdiction.[135]

In *Connecticut General Life Insurance Co. v. Craton*,[136] which arose in the Fifth Circuit, an action was brought by a union and its individual members against the employer and its insurance carrier to determine rights to insurance coverage arising out of a collective bargaining agreement. The action was brought under the aegis of section 301 of the Labor Management Relations Act.[137] The threshold question presented was whether, when a union and individual union members seek relief against an insurance carrier, not their employer, such an action was a suit for violation of a contract between an employer and labor organization as required by section 301 of the LMRA. The Fifth Circuit found it unnecessary to determine whether section 301 was sufficiently broad to encompass such an action because it held that the district court had the power, under the *Gibbs* rationale, to join the insurance carrier.

Pennsylvania requires by statute that all redresses of wrongs be sought in a single suit.[138] This may have influenced the Third Circuit's approach,[139] since it allowed joinder of pendent parties in *Jacobson v. Atlantic City Hospital*[140] in which the state, New

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[134]Plaintiff's grievance was that the union, as the local bargaining representative, discriminated against him by refusing him membership, by failing to protect his employment rights, and by wrongfully procuring his discharge by filing false charges with the employer. 331 F.2d at 532. The wrongful discharge claim was cognizable at common law for breach of contract. *Id.* at 539.

[135]*See, e.g.*, Stone v. Stone, 405 F.2d 94 (4th Cir. 1968).

[136]405 F.2d 41, 48 (5th Cir. 1968); *see, e.g.*, Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971) (state law tort claim may be joined with action for violation of civil rights under section 1983).

[137]29 U.S.C. § 185 (1970).

[138]PA. STAT. ANN. § 1625 (1957) (relating to parent and child: "two rights of action shall be redressed in only one suit, brought in the names of the parent and child.").

[139]The Third Circuit has characterized itself as having taken the lead in recognizing diversity jurisdiction over an entire lawsuit in tort cases presenting closely related claims. Nelson v. Keefer, 451 F.2d 289 (3d Cir. 1971).

[140]392 F.2d 149 (3d Cir. 1968). The court interpreted the New Jersey Death Act which limited the amount of recovery to $10,000. The action was a malpractice suit against the hospital and two physicians who had attended

Jersey, did not adhere to a similar unity-of-claims approach. *Wilson v. American Chain & Cable Co.*[141] is representative of the Third Circuit approach. The plaintiffs in this diversity action alleged injuries to a child and sought consequential damages sustained by the child's father as a result of defendant's negligent design of a riding rotary lawnmower. The district court dismissed the father's claim, but the court of appeals held the father's claim ancillary to the son's claim which met the jurisdictional amount requirement.

Although the Second Circuit belatedly joined the trend favoring pendent jurisdiction over pendent party claims, its three major opinions, all authored by Judge Friendly, concerned three significant areas of the law—welfare, admiralty, and copyright. In *Astor-Honor, Inc. v. Grosset & Dunlop, Inc.*,[142] plaintiff, a book publisher, sued William F. Buckley, Jr., and his publisher for an alleged violation of copyright law. The complaint also asserted against Grosset & Dunlop a state claim of conspiracy to infringe Astor's copyright. The district court, in dismissing the state claim for lack of subject matter jurisdiction, had held that pendent jurisdiction did not extend to parties not subject to the jurisdiction-conferring claim.[143] The Second Circuit, however, reversed and held that since the pendent claim met *Gibbs'* "sufficient relationship" test, that is, since the claims derived from a common nucleus of operative fact, the court had judicial power to exercise discretion in hearing the pendent claim. The court indicated that it matters not that, in the exercise of the power, jurisdiction is extended over a pendent party who is not otherwise subject to suit in that forum. In *Leather's Best, Inc. v. The Mormaclynx*,[144] an unprecedented admiralty case, the Second Circuit held that the

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the plaintiff during hospitalization. The Third Circuit held that subject matter jurisdiction under section 1332 was present and, hence, judicial power to exercise discretion over the pendent parties and claims was not lacking.

[141]364 F.2d 558 (3d Cir. 1966). These claims were of the kind which the Pennsylvania statute required to be redressed in a single suit. *See, e.g.*, Borron v. Sharon Steel Co., 327 F.2d 165, 172-74 (3d Cir. 1964) (recognizing pendent power when diversity of citizenship existed in a survival action by permitting an accompanying wrongful death action when diversity was lacking to be appended to it).

[142]441 F.2d 627 (2d Cir. 1971). The complaint alleged that Buckley had contracted with plaintiff to publish a book. Buckley later contracted with Bantam Books, a wholly-owned subsidiary of Grosset & Dunlop, Inc. *Id.* at 628.

[143]The authority for this pre-*Gibbs* narrowness could be found in Wasserman v. Perugini, 173 F.2d 305, 306 (2d Cir. 1949).

[144]451 F.2d 800 (2d Cir. 1971).

district court, vested with admiralty jurisdiction over the shipper's claim against the vessel and its owner for breach of a contract of carriage, had judicial power to entertain a state tort claim against the vessel owner's subsidiary. The shipper had sought damages against the vessel, the vessel owner, and the owner's wholly-owned subsidiary for the value of cargo lost while in the custody of the subsidiary after it had been discharged from the deck of the vessel. In *Leather's Best,* the court reasoned that since the rules of civil procedure and admiralty jurisdiction were merged in 1966, the constitutional rationale underlying ancillary jurisdiction under rules 13 and 14 of the Federal Rules of Civil Procedure was supportive of the conclusion that a federal court had the power to hear related state claims against pendent parties not named in the federal claim, regardless of whether the claim arose in admiralty or civil jurisdiction.[145] Finding that the facts underlying the state tort claim against the subsidiary and the federal claims against the vessel owner were identical, the court in *Leather's Best* concluded that power to hear the pendent claims against the pendent party existed and discretion to exercise the power was appropriate.[146]

The gravity of the Second Circuit's opinion in *Almenares v. Wyman*[147] will hopefully not be overshadowed by the Supreme Court's decision in *Hagans.* In both, substantial constitutional deprivations were alleged to have resulted from state application of welfare payments. Appended to each jurisdiction-conferring claim were claims alleging violation of the supremacy clause—conflicts between HEW regulations and state action. In *Almenares,* the pendent supremacy claim against the state welfare commissioner was deemed cognizable under *Gibbs. Almenares* differed in two respects from *Hagans.* First, it held that the district court

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[145]*Id.* at 810-11. The court noted that the effect of merger upon the pre-merger admiralty requirement of independent jurisdiction for impleader has not been resolved conclusively. The court did not perceive the requirement of independent jurisdiction in the pre-merger admiralty impleader rule 56 to have constitutional underpinnings. *Id.* at 810 n.12. *See* 3 J. MOORE, *supra* note 79, ¶ 14.50; 6 C. WRIGHT & A. MILLER, *supra* note 79, § 1465. Prior to the merger rules, maritime jurisdiction did not recognize compulsory counterclaims or ancillary jurisdiction. 451 F.2d at 810 n.11.

[146]*Id.* at 811. *See, e.g.,* Ryan v. J. Walter Thompson Co., 453 F.2d 444, 446 (2d Cir. 1971).

[147]453 F.2d 1075 (2d Cir. 1971). The jurisdiction-conferring claim alleged that the termination of welfare payments violated the due process clause. Jurisdiction was based on 28 U.S.C. § 1343(3). *See also* Goldberg v. Kelly, 397 U.S. 254 (1970).

had *power* to hear the statutory-supremacy claim[148] and, secondly, that a class action could be appended to an action brought by an individual even if the federal basis of jurisdiction did not go to the class action.[149] The effect of *Almenares* was to permit the pendent statutory claim to proceed as a class action, unlike the result in *Rosado* which required that both the constitutional and statutory claims be maintained as a class action. *Almenares* allowed adjudication of claims of a class of individuals who, in the absence of the exercise of pendent jurisdiction, could not themselves have invoked the federal court's jurisdiction.[150] The holding was limited, however, to actions brought under rule 23(b)(2) which involve relief common to the class.[151]

It is true, as these cases illustrate, that the broadening of pendent discretion to incorporate the joinder of pendent parties grants jurisdiction over both the pendent claim and party to a federal forum which would otherwise lack subject matter jurisdiction. However, since personal jurisdiction over the pendent party is still a prerequisite, whether suit is in federal or state court, the exercise of pendent discretion, and the joinder of all claims and parties in one forum and in one civil action, promotes the purpose of the Federal Rules of Civil Procedure—to secure the just, speedy, and inexpensive determination of every action.

III. Concluding Observations

Those circuits that have addressed themselves to the question of the joinder of pendent parties have construed *Gibbs* broadly so as to allow pendent jurisdiction over claims of pendent parties not otherwise subject to the federal courts' jurisdiction. These courts do not seem reluctant to allow the joinder of either pendent defendants or pendent plaintiffs, although the argument in favor

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[148] 453 F.2d at 1082.

[149] *Id.* at 1083-84. The *Almenares* court decided that rule 23 does not preclude such a result. Because this was a federal claim appended to another federal claim, there was no problem of coordination of federal regulation of national applicability and thus the pendent claim was suited for decision in a federal forum.

[150] *Id.* at 1084.

[151] Judge Friendly's opinions are particularly interesting since he is not known as an advocate of broader federal jurisdiction. Indeed, he has often been in the forefront in American jurisprudence cautioning in favor of judicial restraint and against an expansionist view in jurisdictional matters. *See generally* H. Friendly, Federal Jurisdiction: A General View (1973) *reviewed in* 87 Harv. L. Rev. 1082 (1974).

of joinder of pendent plaintiffs are stronger. This should not be viewed as an unreasonable extension of *Gibbs* since it fully comports with the liberal policy of joinder of claims and parties under the Federal Rules of Civil Procedure. Moreover, given *Gibbs'* lucid reformulation of the doctrine from its narrow antecedent in *Hurn,* the joinder of pendent parties, whose claims arise out of the same operative facts as the jurisdiction-conferring claim, allows a court to adjudicate the whole of the controversy and at the same time avoids piecemeal and multiple litigation. This approach recognizes that substantial economy can flow from a unification of claims in one suit; it reduces costs to the litigant and prevents duplication in the courts.

Some inconvenience, however, may exist. The federal trial courts, of course, must shoulder the burden of adjudicating additional pendent party claims. However, if the doctrine's discretionary considerations remain flexible, the trial court is in the best position to determine whether or not judicial time, economy, and convenience will best be served by the exercise of the power. Flexibility and substantial discretion are critical if pendent party claims are to be manageable. If joinder would create manageability problems, it is within the trial court's discretion not to exercise the power.

As has been noted, no delineation has been recognized by the lower federal courts between diversity and federal question jurisdiction in relation to the limitations of pendent power over joinder of pendent party claims. It is submitted that no such anomaly should be compelled. It can hardly be asserted that federal courts lack competence to adjudicate state law claims appended to diversity jurisdiction claims, themselves matters of state law, but are competent when the state law claims are appended to federal question jurisdiction claims. Given the daily experience of the federal trial courts in applying the doctrine of *Erie Railroad v. Tompkins,*[152] such fears are ill-founded.

Contrary to the dissent in *Hagans,* neither the substantiality doctrine nor the *Gibbs* power test was expanded by the majority. The decision reached in *Hagans* was a logical result in light of the competing policy issues of judicial restraint in both *Siler* and *Gibbs.* The result was merely to give more credence and reverence to the long-accepted *Siler* doctrine that courts should only as a last resort decide constitutional issues. If the application of this doctrine necessitates initial adjudication of a pendent claim,

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[152]304 U.S. 64 (1938).

whether federal or state, in order to dispose of the case without resort to constitutional decisionmaking, then this approach is favored. *Gibbs* did not present the dilemma because no constitutional issue was presented. To decide first the pendent claim, which is itself a federal claim although nonjurisdiction-conferring, does not subvert judicial power nor disengender the discretionary exercise of that power. As *Gibbs* and *Rosado* proclaimed, if the pendent claim is closely tied to questions of federal policy then the argument for exercise of jurisdiction is particularly strong. This is equally true for state pendent claims that implicate important areas of federal interest such as civil rights, welfare, admiralty, labor law, and securities regulation.

COMMENT

BUYER LIABILITY FOR INDUCING OR RECEIVING DISCRIMINATORY PRICES, TERMS, AND PROMOTIONAL ALLOWANCES: CAVEAT EMPTOR IN THE 1970's*

PAUL J. GALANTI**

A prime concern of purchasing managers and others responsible for procuring supplies and merchandise for business enterprises is, or should be, the possibility of incurring liability under federal law for inducing or receiving discriminatory and presumably more favorable prices, terms or conditions of sale, or promotional allowances than are available to the competition. The main source of this liability is section 2(f) of the price discrimination statute commonly referred to as the Robinson-Patman Act.[1] The purpose of this Comment is to review the basic elements of buyer liability under section 2(f) and to recount some recent developments that should be of concern to those engaged in purchasing. Advice will be offered that hopefully will help those involved in such activities avoid financial liability to aggrieved competitors or even suppliers and, equally important if not more so, restrictive Federal Trade Commission cease and desist orders.

The Federal Trade Commission is the federal agency principally responsible for government enforcement of the Robinson-Patman Act[2]—or, as it is more properly designated, section 2 of

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*This Comment is based on a speech made by Professor Paul J. Galanti at the Third Annual Wabash Valley Purchasing Management Association Seminar held in Terre Haute, Indiana, on March 15, 1973.

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[1]15 U.S.C. § 13(f) (1970) [hereinafter referred to as the Act].

[2]*Id.* § 21. Certain specified federal administrative agencies are authorized to enforce compliance with the substantive provisions of the Clayton Act by enterprises within their respective jurisdictions. Section 15 of the Clayton Antitrust Act, *id.* § 25, charges the United States Department of Justice with the duty of instituting equity proceedings to prevent and restrain violations of the antitrust laws, including the Robinson-Patman Act. *See* United States

the Clayton Antitrust Act as amended by the Robinson-Patman Act.[3] Although the prime source of buyer liability for inducing or receiving favorable treatment is section 2(f) of the Robinson-Patman Act, this section is not exclusive. Purchasers can also incur liability under section 2(c) of the Act[4] and section 5 of the Federal Trade Commission Act.[5] While section 5 is undoubtedly best known as the statutory basis for FTC attacks on deceptive

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v. Borden Co., 347 U.S. 514, 518 (1954). Criminal enforcement of the antitrust laws, including section 3 of the Robinson-Patman Act, is the exclusive province of the Department of Justice. 15 U.S.C. §§ 4, 24 (1970); 18 U.S.C. § 4 (1970). *See* United States v. Wise, 370 U.S. 405 (1962); 16I J. VON KALINOWSKI, BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATIONS, §§ 70.01, 80.02, 80.05 [1] (1972) [hereinafter cited as J. VON KALINOWSKI]. For discussion of how the FTC and the Department of Justice resolve the conflicts inherent in this concurrent jurisdiction, see ABA, ANTITRUST DEVELOPMENTS 1955-1968, at 271-74 (1968) [hereinafter cited as ABA, ANTITRUST DEVELOPMENTS]; D. BAUM, THE ROBINSON-PATMAN ACT, SUMMARY AND COMMENT 111-13 (1964); 1 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 83-86 (1973); A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 373-95 (2d ed. 1970); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 374-77 (1955) [hereinafter cited as 1955 REPORT].

[3]15 U.S.C. §§ 12-27 (1970).

[4]*Id.* § 13(c).

[5]*Id.* § 45(a). [The Federal Trade Commission hereinafter will be referred to as the FTC or the Commision.] This is not an exhaustive litany of federal statutes which can be the basis of buyer liability. The seldom invoked criminal provisions of section 3 of the Robinson-Patman Act, *id.* § 13a, which parallel and largely duplicate the civil sanctions of section 2, on their face appear to apply to buyers as well as to sellers. However, the actual application of section 3 to buyers has not been thoroughly tested in the courts, and Frederick M. Rowe, a foremost Robinson-Patman Act scholar, posits that section 3 is limited to sellers. F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 459-60 (1962). Rowe's hypothesis is at least tangentially supported by the enforcement history of section 3. The Justice Department has been reluctant to invoke the sanction against buyers, perhaps because of some serious doubts as to the constitutionality of the provision. For example, in the proceedings reported in United States v. Bowman Dairy Co., 1948-1949 Trade Cas. ¶ 62,403 (N.D. Ill. 1949), only the dairy product sellers and not the chain store buyers were indicted under section 3. The Justice Department did indict the purchasing dairy as well as the selling cooperative under section 3 in United States v. Maryland & Virginia Milk Producers Ass'n, 151 F. Supp. 438 (D.D.C. 1957), but the indictment was voluntarily dismissed prior to trial. In United States v. H.P. Hood & Sons, 1963 Trade Cas. ¶ 70,728 (D. Mass. 1963), the buyer and the seller were charged with violating sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-11 (1970), but only the seller was charged with violating section 3 of the Robinson-Patman Act. Both defendants were acquitted on March 19, 1965. ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 156 n.5.

and misleading advertising,[6] its proscription against "unfair methods of competition" has been utilized by the FTC to fill a serious gap in the regulatory scheme established by the Robinson-Patman Act. This gap and the FTC's use of section 5 to fill it will be considered more fully in the ensuing discussion.[7]

The *Report of the Attorney General's National Committee to Study the Antitrust Laws, supra,* note 2, characterized section 3 of the Robinson-Patman Act as "dangerous surplusage" and, in urging repeal, observed that "doubts besetting section 3's constitutionality seem well founded; no gloss imparted by history or adjudication has settled the vague contours of this harsh criminal law. It does not serve the public interest of antitrust policy." *Id.* at 201 (footnote omitted). The constitutionality issue was resolved in part in United States v. National Dairy Prods. Corp., 372 U.S. 29, 33 (1963), in which the third of the three substantive clauses of section 3 (unreasonably low prices) was held "constitutional as applied."

Section 3 rarely has been invoked since 1958, when the Supreme Court, in Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958), held that it was not an "antitrust law" within the meaning of section 1 of the Clayton Antitrust Act, 15 U.S.C. § 12 (1970). A finding that section 3 was an "antitrust law" would have permitted private victims to secure treble damage redress. A treble damage action will lie, however, when conduct proscribed by section 3 also violates section 2. Englander Motors, Inc. v. Ford Motor Co., 186 F. Supp. 82, 84 (N.D. Ohio 1960), *aff'd,* 293 F.2d 802 (6th Cir. 1961). For general discussion of section 3 of the Robinson-Patman Act, see ABA ANTITRUST DEVELOPMENTS, *supra* note 2, at 155-56; D. BAUM, *supra* note 2, at 74-76; 1 M. HANDLER, *supra* note 2, at 304-08; E. KINTNER, A ROBINSON-PATMAN PRIMER 266-80 (1970); 1955 REPORT, *supra* note 2, at 198-201; F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 452-75 (1962); *id.* at 112-17 (Supp. 1964); 16D J. VON KALINOWSKI ch. 37.

There is no question but that discriminatory pricing and related practices, including abuse of power by large and aggressive buyers, can result in civil liability under the Sherman Act. *See, e.g.,* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948). Buyers inducing or coercing secret price discriminations have been successfully prosecuted on criminal charges brought under the Sherman Act. *See, e.g.,* United States v. New York Great A. & P. Tea Co., 67 F. Supp. 626, 676 (E.D. Ill. 1946), *aff'd,* 173 F.2d 79 (7th Cir. 1949). A buyer inducing or receiving price or related commerical discriminations might also violate the myriad of state law applicable to price discriminations. For a general survey of state law in this area, see, 1 TRADE REG. REP. ¶¶ 3510-96 (1974); F. ROWE, *supra,* § 3.6.

[6]The cases and literature on deceptive advertising are legion. However, a brief bibliography of the FTC's efforts against such practices must include: E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES (1971); E. KINTNER, AN ANTITRUST PRIMER 115-23, 142-49, 164-203 (2d ed. 1973); S. OPPENHEIM, UNFAIR TRADE PRACTICES 352-404 (2d ed. 1965); Millstein, *The Federal Trade Commission and False Advertising,* 64 COLUM. L. REV. 439 (1964).

[7]*See* text accompanying notes 34-41 *infra.* The FTC has also utilized section 5 to "bolster" and "supplement" the Sherman Act, which is not specifically enforced by the Commission, and sections 3 and 7 of the Clayton

The location of the Robinson-Patman Act in the spectrum of federal statutes regulating competition is significant. As an amendment to the Clayton Act, section 2 is deemed an "antitrust law" within the meaning of section 1 of the Act[8] and the prohibitions against price and other related forms of commercial discrimination can be enforced by the private treble damage suits familiar to all.[9] Although not many private suits which significantly involved the buyer liability provisions of the Robinson-Patman Act have been brought—up to now, less than a dozen mostly unsuccess-

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Act, 15 U.S.C. §§ 14, 18 (1970), which is. *See, e.g.*, FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 394 (1953); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1940); L.G. Balfour Co. v. FTC, 442 F.2d 1, 14 (7th Cir. 1971); Beatrice Foods Co., 67 F.T.C. 473 (1965). In FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972), the Supreme Court gave an affirmative answer to the two-fold question whether section 5 empowers the FTC to "define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws," and to "proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition." For consideration of section 5 as an "antitrust law," see ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 252-59, and authorities cited in M. HANDLER, TRADE REGULATION 1310-11 (4th ed. 1968); S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS 621-40 (3d ed. 1968). Using section 5 to fill regulatory gaps in other antitrust laws has not gone uncriticized. *See, e.g.*, 1 M. HANDLER, *supra* note 2, at 67-68, 420-31, 665-77; 2 *id.* at 1030-43; Alexander, *Section 5 of the Federal Trade Commission Act, a Deus ex Machina in the Tragic Interpretation of the Robinson-Patman Act*, 12 SYRACUSE L. REV. 317 (1961); Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act With the Sherman and Clayton Acts*, 59 MICH. L. REV. 821, 851 (1961).

[8]15 U.S.C. § 12 (1970).

[9]Such suits are authorized by section 4 of the Clayton Act. *Id.* § 15. Injunctive relief is also available to private plaintiffs for Robinson-Patman Act violations. *Id.* § 26. For discussion of the procedures, problems and intricacies of private enforcement of the antitrust laws, see ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 274-310; C. AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 171-74 (2d rev. ed. 1959); A. NEALE, *supra* note 2, at 395-400; 1955 REPORT, *supra* note 2, at 378-85; F. ROWE, *supra* note 5, at 524-33; 16L J. VON KALINOWSKI chs. 99-103. For conflicting views as to the proper measure of damages in Robinson-Patman Act cases, *compare* Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947); Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988, 996 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945); *and* Fowler Mfg. Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970), *with* Enterprise Indus., Inc. v. Texas Co., 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1956). *See generally* 2 M. HANDLER, *supra* note 2, at 896-902; Comment, *Damages Under the Robinson-Patman Act*, 31 MD. L. REV. 60 (1970).

ful or at best partially successful have appeared in the law reports[10] —this sanction is not a dead letter and purchasers can ignore it only at their peril.[11] As the FTC steps up enforcement of the Robinson-Patman Act against what former FTC Chairman Miles W. Kirkpatrick and others have characterized as "power buyer abuses,"[12] it is quite likely that more private actions will be brought. Rather than proceeding against the sellers who have been the usual targets of FTC prosecutions, the Commission is now likely to file complaints against buyers who are dominant in unbalanced power situations.[13] Chairman Kirkpatrick's legacy to the

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[10]Texas Gulf Sulphur Co. v. J.R. Simplot Co., 418 F.2d 793 (9th Cir. 1969); Fowler Mfg. Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969); Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916 (5th Cir. 1962); State Wholesale Grocers v. Great A. & P. Tea Co., 154 F. Supp. 471 (N.D. Ill. 1957), *rev'd*, 258 F.2d 831 (7th Cir. 1958); Kapiolani Motors, Ltd. v. General Motors Corp., 337 F. Supp. 102 (D. Hawaii 1972); Metropolitan Dry Cleaning Mach. Co. v. Washex Mach. Corp., 1969 Trade Cas. ¶ 72,686 (E.D.N.Y. 1968); Big Value Stamp Co. v. Sperry & Hutchinson Co., 1967 Trade Cas. ¶ 71,978 (S.D. Ohio 1967); Rosenfeld Co. v. Lion Mfg. Corp., 1961 Trade Cas. ¶ 69,937 (N.D. Ill. 1961); Robinson v. Stanley Home Prods., Inc., 178 F. Supp. 230 (D. Mass.), *aff'd on other grounds*, 272 F.2d 601 (1st Cir. 1959); Robinson v. Stanley Home Prods., Inc., 174 F. Supp. 414 (D.N.J. 1959); Krug v. International Tel. & Tel. Corp., 142 F. Supp. 230 (D.N.J. 1956). The "partially successful" reference is to cases, such as *Krug*, in which the adequacy of the section 2(f) complaint was tested by a motion to dismiss rather than by a consideration of plaintiff's evidence in support of the allegations.

[11]This caveat assumes purchases of commodities in interstate commerce, as the Act encompasses only such transactions. The jurisdictional elements of a Robinson-Patman violation will be expanded upon below. *See* text accompanying notes 108-12 *infra*. *See generally* Comment, *The Interstate Commerce Requirement of Section 2(a) of the Robinson-Patman Act*, 44 U. COLO. L. REV. 607 (1973); Note, *Commerce Requirement of the Robinson-Patman Act*, 22 HASTINGS L. REV. 1245 (1971).

[12]Address by Miles W. Kirkpatrick, Antitrust Law Section of the New York State Bar Association, January 28, 1971. *See also* Address by Basil J. Mezines, Executive Director, FTC, Automobile Warehouse Distributor Association, March 6, 1973; Address by Lawrence G. Meyer, Director, Office of Policy Planning and Evaluation, FTC, Annual Meeting of the State Bar of Texas, July 1, 1971.

[13]An interesting variation of the power buyer theme was tried—and rejected in Mark Plastic Prods., Inc. v. Exxon Corp., 1973-2 Trade Cas. ¶ 74,784 (E.D. Mich. 1973), in which plaintiff urged, in support of its motion to dismiss a section 2(f) counterclaim, that the provision only applied "to a dominant buyer using his dominant economic power to force a seller to sell at discriminatory prices." *Id.* at 95,492. For general observations on power buying, see Applebaum, *Fundamentals of Buyer's Violation Under Robinson-Patman Act*, 39 ANTITRUST L.J. 869 (1970); Scher, *New Directions in Buyer's Liability Under the Robinson-Patman Act*, 39 ANTITRUST L.J. 884 (1970).

business community is, for better or for worse, an activist FTC. It is still too early to predict whether the Commission will change directions under its new chairman, Lewis A. Engman, but it seems doubtful that it will retreat to the semicomatos state that gave rise to the well-deserved sobriquet: "The Old Lady of Pennsylvania Avenue."[14]

Stepped up Robinson-Patman Act enforcement by the FTC is likely to result in an increase in private treble damage actions, given congressional emphasis on the so-called "private attorney general." To complement the enforcement functions of the FTC and the Department of Justice, Congress specifically provided in section 5(a) of the Clayton Act[15] that a final "judgment" or "decree" obtained in a government antitrust prosecution, including an FTC order under the Robinson-Patman Act,[16] could be used as prima facie evidence of a defendant's "transgressions" in a treble damage suit brought by a private plaintiff. This does not mean that the plaintiff automatically prevails, but it does ease his task, inasmuch as the Government has already done most of the work.[17] Further,

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[14]The FTC has had more than its share of criticism—some balanced, some biased. Inefficiency and a lack of goals and directions seem to be the common themes of the analyses. *See, e.g.*, E. Cox, R. Fellmeth & J. Schulz, Nader Report on the Federal Trade Commission (1969); Report of the American Bar Association Commission to Study the Federal Trade Commission (1969) (chaired by Mr. Kirkpatrick); Symposium, *The Fiftieth Anniversary of the Federal Trade Commission*, 64 Colum. L. Rev. 385 (1964). For a position questioning the need for the FTC, see Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47 (1969). For varied analysis of FTC developments since 1969, see Symposium, *The FTC: Revitalized or Repackaged*, 41 Antitrust L.J. 453 (1972).

It should be noted that since this speech was delivered, Lewis A. Engman has demonstrated an interest in a vital and active FTC, although his objectives differ from those of his predecessor. *See, e.g.*, the emphasis on the line-of-business report program of the FTC, 5 Trade Reg. Rep. ¶ 50,204 (1974), and Mr. Engman's speech on antitrust and the energy crisis to the Antitrust Section of the State Bar of Michigan on February 15, 1974, reprinted at 5 Trade Reg. Rep. ¶ 50,200 (1974).

[15]U.S.C. § 16(a) (1970). *See* Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).

[16]Farmington Dowel Prods. Co. v. Forster Mfg. Co., 299 F. Supp. 1043 (D. Me. 1967), *aff'd*, 421 F.2d 61 (1st Cir. 1970); Purex Corp. v. Proctor & Gamble Co., 308 F. Supp. 584 (C.D. Cal. 1970). However, there is some authority that an order in a section 5 proceeding is not entitled to prima facie effect. *In re* Coordinated Pretrial Proceedings in Antitrust Actions, 333 F. Supp. 317 (S.D.N.Y. 1971). *Cf.* Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958).

[17]Consent decrees entered before testimony is taken and decrees or judgments in government damage suits brought under section 4A of the Clayton

section 5(b) of the Clayton Act[18] reduces time pressures on injured plaintiffs by tolling the running of the four-year statute of limitations during, and for one year following, a government prosecution.[19] Competitors who did not receive the favored treatment or a losing bidder who might have secured business but for an illegal price discrimination occasioned by a competitor's illegal conduct should provide a substantial class of potential plaintiffs interested in bringing such private suits.[20]

Although the importance of treble damage litigation in the scheme of Robinson-Patman Act enforcement cannot be overemphasized—a judgment of three times the amount of damages suffered by an aggrieved plaintiff plus costs and attorneys' fees is a significant deterrent to violations—the buyer liability provisions of the Act will generally be enforced by the FTC in pro-

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Act, 15 U.S.C. § 15(a) (1970), are specifically excluded from section 5(a). *See generally* ABA ANTITRUST DEVELOPMENTS, *supra* note 2, at 294-99; E. KINTNER, AN ANTITRUST PRIMER 152-53 (2d ed. 1973); Simon, *The Private Litigant and Prior Government Judgments or Decrees*, 7 ANTITRUST BULL. 27 (1962); Timberlake, *Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws*, 36 N.Y.U.L. REV. 991 (1961). Admittedly, the private plaintiff has not always been aided by section 5(a). *See* H. BLAKE & R. PITOFSKY, CASES AND MATERIALS ON ANTITRUST LAW 1374-75 (1967).

[18]15 U.S.C. § 16(b) (1970).

[19]In fact, section 5(b) tolls the statute even when the judgment or decree could not be utilized as prima facie evidence under section 5(a) because of differences in issues or because the government failed in its prosecution. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 316-21 (1965). Perhaps the two provisions should be characterized as "fraternal" rather than "identical" twins, expressing congressional intent to permit private plaintiffs to cull maximum benefits from prior government actions. Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61, 66 (1st Cir. 1969). Prior to the adoption of the four year antitrust statute of limitations in 1955, 15 U.S.C. § 15(b) (1970), federal courts looked to the law of the forum state to determine the statute of limitations. *See, e.g.*, Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906); Schiffman Bros., Inc. v. Texas Co., 196 F.2d 695 (7th Cir. 1952). For general discussion of statute of limitations problems, see ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 286-90; 2 M. HANDLER, *supra* note 2, at 964-76; E. KINTNER, AN ANTITRUST PRIMER 152-54 (2d ed. 1973); F. ROWE, *supra* note 5, at 524-26; 16L J. VON KALINOWSKI ch. 103.

[20]The key to standing to bring a private antitrust action is injury to plaintiff's "business or property by reason of anything forbidden in the antitrust laws . . . ." 15 U.S.C. § 15 (1970). *See generally* ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 279-84; E. KINTNER, AN ANTITRUST PRIMER 150-52 (2d ed. 1973); F. ROWE, *supra* note 5, at 524-28; *id.* at 164 (Supp. 1964); 16L J. VON KALINOWSKI ch. 101.

ceedings seeking cease and desist orders.[21] At the present time the FTC is the only agency enforcing the restraints on business conduct imposed by section 5 of the FTC Act.[22] However, there have been proposals in recent sessions of Congress to make section 5 violations actionable in private damage or injunction suits.[23] This could be accomplished in several ways. Section 5 itself could be amended to authorize private suits; a federal consumer protection act incorporating the substantive provisions of section 5 and providing for private enforcement could be adopted; or, unlikely but not impossible, section 1 of the Clayton Act[24] could be amended to include the FTC Act as an "antitrust law" enforceable by treble damage actions.[25] It is also conceivable that a federal court might

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[21]15 U.S.C. § 21 (1970). *See* note 2 *supra*. The authority of the FTC to formulate remedial orders under the Robinson-Patman Act is quite extensive and the Commission is not limited to entering orders directed only to specific violations found to exist. FTC v. Ruberoid Co., 343 U.S. 470 (1952); Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 681-82 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965). The reason for the rule is simple. A restricted or limited order could be circumvented easily. However, the authority of the FTC is not unlimited and the cease and desist order must be warranted by the underlying record in the case. FTC v. Henry Brock & Co., 368 U.S. 360, 366 (1962). *See generally* ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 259-66; C. AUSTIN, *supra* note 9, at 167-71; D. BAUM, *supra* note 2, at 92-109; F. ROWE, *supra* note 5, at 504-14; Kintner, *Scope of Federal Trade Commission Orders in Price Discrimination Cases*, 14 BUS. LAW. 1053 (1959).

[22]15 U.S.C. § 45(b).

[23]*See, e.g.*, H.R. 5986, 92d Cong., 1st Sess. (1971); H.R. 5368, 92d Cong., 1st Sess. (1971); H.R. 1078, 92d Cong., 1st Sess. (1971); H.R. 14931, 91st Cong., 1st Sess. (1969); H.R. 14585, 91st Cong., 1st Sess. (1969); S. 1823, 92d Cong., 1st Sess. (1971); S. 1378, 92d Cong., 1st Sess. (1971); S. 3201, 91st Cong., 1st Sess. (1969); S. 3092, 91st Cong., 1st Sess. (1969). *See generally* Eckhardt, *Consumer Class Actions*, 45 NOTRE DAME LAW. 663 (1970); Note, *An Act to Prohibit Unfair and Deceptive Trade Practices*, 7 HARV. J. LEGIS. 122, 147 (1969).

[24]15 U.S.C. § 12 (1970). In Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958), the Supreme Court held that the definition of antitrust laws in section 1 is exclusive.

[25]Designating the FTC Act as an antitrust law or authorizing private section 5 suits might well be desirable if the provision were limited to conduct cognizable under other antitrust laws but, as Judge Harold Leventhal of the District of Columbia Circuit Court of Appeals pointed out in Holloway v. Bristol-Myers Corp., 1973-2 Trade Cas. ¶ 74,623 (D.C. Cir. 1973), in denying a private cause of action for allegedly deceptive nonprescription analgesic advertising, the flexibility inherent in FTC enforcement of section 5 in the sphere of advertising and the vagueness of the substantive provisions are incompatible with private enforcement. *Id.* at 94,757-59. Judge Leventhal's opinion is an excellent survey of the legislative history of section 5 as

hold that a violation of federal regulatory legislation such as the FTC Act automatically supports a tort damage suit. Decisions under federal securities laws and other federal statutes would furnish ample precedent for such a ruling,[26] but the courts so far have uniformly held that a section 5 violation does not give rise to a private cause of action.[27]

There is a bit of irony in the FTC's recent shift of Robinson-Patman emphasis from sellers to buyers. The Act was passed by Congress in 1936[28] as an amendment to section 2 of the Clayton Act of 1914. The original provision had been directed at localized price cutting by monopolistic sellers intending to force their competitors out of business.[29] The earlier provision was not intended

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adopted and the 1938 Wheeler-Lea Amendments, 52 Stat. 111 (1938). As pointed out in Van Cise, Scher & Weil, *The Use and Expansion of Section 5 of the Federal Trade Commission Act*, BUS. LAW., Mar. 1973, at 61, 72-73 (special issue), the FTC has not utilized section 5 to attack discriminatory arrangements entirely without the ambit of the Robinson-Patman Act. *See* Grand Union Co. v. FTC, 300 F.2d 92, 95-96 (2d Cir. 1962), and text accompanying notes 163-65 *infra*. However, it is too early to tell if the broad reading of section 5 in FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972), will have any impact here.

[26] *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1963); Fitzgerald v. Pan American World Airways, Inc., 229 F.2d 499, 501 (2d Cir. 1956). Judge Gus J. Solomon, in his dissent in Carlson v. Coca-Cola Co., 483 F.2d 279, 281 (9th Cir. 1973), argued that section 5 did in fact create a private remedy for unfair or deceptive acts or practices. *See generally* Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271 (1971); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963); Note, *A Private Right of Action Under Section 5 of the Federal Trade Commission Act*, 22 HASTINGS L. REV. 1268 (1971).

[27] Moore v. New York Cotton Exchange, 270 U.S. 593, 603 (1926); Holloway v. Bristol-Myers Corp., 327 F. Supp. 17 (D.D.C. 1971), *aff'd*, 1973-2 Trade Cas. ¶ 74,623 (D.C. Cir. 1973); Carlson v. Coca-Cola Co., 318 F. Supp. 785 (N.D. Cal. 1970), *aff'd*, 483 F.2d 279 (9th Cir. 1973); Frederick Chusid Co. v. Marshall Leeman & Co., 326 F. Supp. 1043, 1063 (S.D.N.Y. 1971); LaSalle St. Press, Inc. v. McCormick & Henderson, Inc., 293 F. Supp. 1004, 1006 (N.D. Ill. 1968); Smith-Victor Corp. v. Sylvania Elec. Prods., Inc., 242 F. Supp. 302, 306 (N.D. Ill. 1965); L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 118 F. Supp. 251, 254 (D. Pa. 1953), *rev'd on other grounds*, 214 F.2d 649 (3d Cir. 1954); Samson Crane Co. v. Union Nat'l Sales Inc., 87 F. Supp. 218, 221 (D. Mass. 1949); National Fruit Prod. Co. v. Dwinell-Wright Co., 47 F. Supp. 499, 504 (D. Mass. 1942); Atlantic Brick Co. v. O'Neal, 44 F. Supp. 39, 41 (D. Tex. 1942).

[28] 49 Stat. 1526 (1936).

[29] F. ROWE, *supra* note 5, § 1.2, at 6. For the background and legislative history of the Robinson-Patman Act, see D. BAUM, *supra* note 2, at 1-5; C. EDWARDS, THE PRICE DISCRIMINATION LAW 1-28 (1959); A. NEALE, *supra*

to combat price coercion on sellers by large volume customers such as the food chain stores. Consequently, it was totally inadequate when the nature of the problem changed between 1914, when the Clayton Act was adopted, and 1936.[30] The genesis of the Robinson-Patman Amendment was the power buyer abuses of the late 1920's and early 1930's. Buyer abuse was the problem, and Congress' primary answer was legislation making it illegal for sellers to grant discriminatory prices or more favorable promotional allowances to selected customers. This anomaly of ending buyer abuse by attacking sellers has been rationalized by some commentators who noted that Congress, in 1936, had serious doubts as to its constitutional power to prohibit a buyer from inducing or receiving favorable price discriminations.[31] In any event, this anomaly is not inappropriate in a rather confusing and turgid piece of federal legislation. Courts have read words out of certain provisions of this statute and have read words into other provisions in which Congress, perhaps studiously, perhaps not, omitted them.[32] All this has been done in the name of trying to achieve a consistent regulatory scheme. If, as Ralph Waldo Emerson opined in an essay on self-reliance, "a foolish consistency is the hobgoblin of little

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note 2, at 225-29; F. ROWE, *supra* note 5, §§ 1.1-1.7, 14.1, & pp. 559-620; 16B J. VON KALINOWSKI chs. 21-22.

[30]The original language of section 2, 38 Stat. 730 (1914), appeared to bar price discriminations prejudicial to competition on the customer level, but court decisions in the 1920's restricted it to seller or primary line competition. *E.g.*, National Biscuit Co. v. FTC, 299 F. 733 (2d Cir. 1924); Mennen Co. v. FTC, 288 F. 774 (2d Cir. 1923). Even the Supreme Court, in George Van Camp & Sons v. American Can Co., 278 U.S. 245 (1929), repudiating the restrictive interpretation of section 2, did not revitalize it vis-à-vis chain stores because the provision unconditionally exempted price differentials made "on account of differences in the grade, quantity or quality of the commodity sold." This quantity discount exemption gave chain stores, in Rowe's words, "carte blanche for unlimited purchasing advantages which the FTC felt powerless to check with the legal safeguards of section 2 of the original Clayton Act." F. ROWE, *supra* note 5, § 1.2, at 7. *See* Goodyear Tire & Rubber Co. v. FTC, 101 F.2d 620 (6th Cir. 1939).

[31]*Cf.* Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927). *See generally* F. ROWE, *supra* note 5, § 14.1.

[32]*Compare* the interpretation of the section 2(c) brokerage provision in Webb-Crawford Co. v. FTC, 109 F.2d 268 (5th Cir.), *cert. denied*, 310 U.S. 638 (1940), *with* the interpretations of the section 2(b) meeting competition defense in Exquisite Form Brassiere Co. v. FTC, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962), *and* the section 2(d) promotional allowance provision in FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968). *Cf.* FTC v. Henry Brock & Co., 363 U.S. 166 (1960); FTC v. Simplicity Pattern Co., 360 U.S. 55, 65-66 (1959); Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988, 993 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945).

minds, adored by little statesmen and philosophers and divines,"[33] this country was blessed with an impressive Congress in 1936. Of course, the operating words of this observation are a "foolish consistency," and this author suspects that some consistency in the statutory language of the Robinson-Patman Act would not have been particularly foolish.

The emphasis on sellers in the bill which ultimately became the Act was such that the key buyer liability provision, section 2(f), was added as an afterthought during Senate debates.[34] Since the substance of section 2(f) came from another bill, it is likely that Congress simply did not realize that language[35] prohibiting buyers from inducing or receiving prices more favorable than those paid by competitors would not apply to buyer-induced discriminatory promotional allowances or services not amounting to indirect price discriminations. Although sellers could not lawfully grant such discriminatory allowances under other provisions of the Robinson-Patman Act, buyers, it seems, were not precluded unless their violations rose to the level of indirect price discriminations. This is the regulatory gap that has been filled by section 5 of the FTC Act.[36] However, some courts have read the Robinson-Patman Act rather expansively and it would not be surprising to see section 2(f) construed to cover discriminatory promotional allowances as well as discriminatory prices, since discriminatory promotional allowances are really just extreme indirect price discriminations.[37] This, in turn, would be a change of great significance

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[33]Emerson, *Essays—First Series: Self Reliance*, in BARTLETT'S FAMILIAR QUOTATIONS 606a (14th ed. 1968).

[34]The provision originated in a bill introduced by Senator Copeland, S. 4024, 74th Cong., 2d Sess. (1936). *See* C. EDWARDS, *supra* note 29, at 45-46; F. ROWE, *supra* note 5, § 14.1, at 423-25.

[35]Section 2(f) of the Robinson-Patman Act is set out at note 44 *infra*.

[36]The Supreme Court, in Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 73 n.14 (1953), expressly left open the question of the applicability of section 2(f) to buyer-induced violations of section 2(d) and 2(e) of the Act. The Commission did not pursue the issue but rather turned to the general prohibitions of section 5. *See, e.g.*, Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962); Giant Food Inc. v. FTC, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963). *See generally* F. ROWE, *supra* note 5, § 14.5; 16D J. VON KALINOWSKI § 36.02[1]. For a discussion of specific section 5 cases, see text accompanying notes 163-65 *infra*. For criticism of the technique, see authorities cited note 7 *supra*.

[37]*See* Fred Meyer, Inc. v. FTC, 359 F.2d 351, 362 (9th Cir. 1966); *cf.* Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988, 990, 993 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945); C. AUSTIN, *supra* note 9, at 126.

as far as private damage suits are concerned, unless FTC Act violations are made actionable in private litigation by Congress or the courts.[38] It would, however, have minimal impact on FTC enforcement since the Commission and the courts apply basically the same criteria when enforcing sections 5 and 2(f)[39] and the remedy, a cease and desist order, is the same.[40] Of course, FTC cease and desist orders cannot be taken lightly. The penalty for violating such an order is a civil penalty of up to $5000 for each violation, with each day of a continuing violation deemed a separate offense.[41]

Many economists and scholars have urged drastic revision of the Robinson-Patman Act, if not repeal in toto.[42] Generally,

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This result would be a return to an earlier view of the scope of section 2(f). For FTC proceedings and private cases attacking beneficiaries of promotional or advertising allowances under section 2(f), see 16D J. VON KALINOWSKI § 36.02[1], at n.15. The rationale was rejected by the Commisison in Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962), notwithstanding that, the Second Circuit, in affirming the ues of section 5, noted that the omission of buyers from sections 2(d) and 2(e) was probably more inadvertant than studious. *Id.* at 96.

[38]*See* text accompanying notes 23-27 *supra.*

[39]*See, e.g.*, Grand Union Co. v. FTC, 300 F.2d 92, 96, 100 (2d Cir. 1962); Giant Food, Inc. v. FTC, 307 F.2d 184, 187 (D.C. Cir. 1962). *See generally* F. ROWE, *supra* note 5, § 14.5; 16D J. VON KALINOWSKI § 36.02[1], at 36-23 to 36-34.

[40]15 U.S.C. §§ 21(b) [Robinson-Patman Act], 45(b) [FTC Act] (1970).

[41]*Id.* §§ 21(l) [Robinson-Patman Act], 45(l) [FTC Act].

[42]The literature is encyclopedic. *See, e.g.*, C. EDWARDS, *supra* note 29, at 617-35, 646-56; M. HANDLER, TRADE REGULATION 1131-48 (4th ed. 1967); Austin, *Isn't Thirty Years Enough?*, 30 A.B.A. ANTITRUST SECTION 18 (1966); Backman, *An Economist Looks at the Robinson-Patman Act*, 17 A.B.A. ANTITRUST SECTION 343 (1960); Levi, *The Robinson-Patman Act—Is It In the Public Interest?*, 1 A.B.A. ANTITRUST SECTION 60 (1952); Rowe, *The Robinson-Patman Act—Thirty Years Thereafter*, 30 A.B.A. ANTITRUST SECTION 9 (1966). As Rowe pointed out in his remarks at the 1966 Spring Meeting of the American Bar Association Antitrust Section, *id.* at 10-11: "Today criticism of the Act's enforcement is mounting. The sleek indignation of *Fortune Magazine* [Editorial, *Antitrust: The Sacred Cow Needs A Vet*, FORTUNE, Nov. 1962, at 104-06] is matched by the hairy outrage of *The New Republic*, no less, at the FTC's Robinson-Patman 'attack' on small businessmen who form co-ops. [Ridgeway, *Out of Business—By FTC Order*, THE NEW REPUBLIC, Feb. 12, 1966 at 13]." The Act is not without defenders but even they tend to recognize the need for administrative changes. *See, e.g.*, Loughlen, *The Little Statute that Ran Away*, 56 A.B.A.J. 681 (1970), Van Cise, *No, Thirty Years Are Not Enough*, 30 A.B.A. ANTITRUST SECTION 28 (1966).

they argue that the statute imposes restraints on price bargaining alien, or supposedly alien, to our competitive economy. In other words, it is anticompetitive in spirit. Nonetheless, it is unlikely that repeal or revision is in the offing, and thus it is necessary for practitioners and purchasers to become familiar with the basic provisions of the Act and the judicial gloss which has been placed on these provisions over the past thirty-eight years.[43]

Basically, section 2(f) prohibits a buyer from knowingly inducing or receiving a price reduction or discount that would cause the seller to violate section 2(a) of the Act.[44] Thus, section 2(f) liability is almost exclusively derivative in nature. "Almost" is used advisedly since in *Kroger Co. v. FTC*,[45] the United States Court of Appeals for the Sixth Circuit affirmed and enforced an FTC order[46] holding that Kroger violated section 2(f) when it induced Beatrice Food Company, by *falsely* claiming receipt of lower bids from Beatrice's competitors, to sell fluid milk and cottage cheese at prices lower than prices charged other customers.[47] Beatrice, however, was absolved from section 2(a) liability because the prices it had quoted Kroger were offered in good faith to meet what it thought were the equally low prices of competitors.[48] Thus, Beatrice was successful in establishing the "good faith meeting competition" defense of section 2(b) of the Act.[49] There was no

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[43]Even the astute and prolific Robinson-Patman critic Professor Milton Handler, *see, e.g.*, 1 M. HANDLER, *supra* note 2, at 431-42, concedes this point while noting that the "good fight" to bring rhyme and reason to the statute must continue. *Id.* at 133.

[44]15 U.S.C. § 13(f) (1970). Section 2(f) reads: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

[45]438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971). Retired Supreme Court Justice Tom Clark wrote the opinion. The case was noted in 40 U. CIN. L. REV. 632 (1971).

[46]Beatrice Foods Co., 76 F.T.C. 719 (1969). A score card is needed for this proceeding since it produced four opinions. Commissioners Elman and Nicholson dissented from the holding against Kroger, and Chairman Dixon and Commissioner MacIntyre dissented from the dismissal of Beatrice. Thus, only Commissioner Jones agreed with both determinations and each of the other four Commissioners dissented to at least one of them.

[47]438 F.2d at 1374, 1377.

[48]*Id.* at 1373-74.

[49]15 U.S.C. § 13(b) (1970). Section 2(b) provides in pertinent part:

> Upon proof being made . . . that there has been discrimination in price or services or facilities furnished, the burden of rebutting the

question in the case that Beatrice had granted discriminatory prices unlawful under the Act but for the defense,[50] which is an absolute defense even if all the elements of a section 2(a) violation exist.[51] The essential feature of *Kroger*, then, is that it answered in the negative the question whether a successful meeting competition defense by the seller automatically discharges the buyer who induced the unlawful price. In most cases, a buyer will not have violated section 2(f) if the seller can establish the meeting competition defense, since the buyer must have "knowingly" induced or received the discrimination.[52] However, as established by *Kroger*, the effective "lying buyer" cannot find protection in the section 2(b) defense of the seller.

The United States Supreme Court refused to hear Kroger's appeal from the Sixth Circuit decision.[53] Although it is conceivable that one of the remaining ten United States Courts of Appeal could reach an opposite conclusion, the Sixth Circuit view of the so-called "lying buyer" should prevail, since it appears to be perfectly consistent with the leading Supreme Court decision on section 2(f) liability, *Automatic Canteen Co. of America v. FTC*.[54] This position is maintained even though Kroger argued, along with more than one Robinson-Patman Act scholar, that *Automatic Canteen* requires the acquittal of a buyer if the seller is vindicated

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prima facie case thus made by showing justification shall be upon the person charged with a violation of this section . . . *Provided, however*, that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that this lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

[50]At least at the secondary level. 76 F.T.C. at 817-21; 438 F.2d at 1379.

[51]Standard Oil Co. v. FTC, 340 U.S. 231, 251 (1951). With two small exceptions the competitor must be the seller's and not the buyer's. FTC v. Sun Oil Co., 371 U.S. 505 (1963). For the elements of and the problems with raising the meeting competition defense, see ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 138-44; C. AUSTIN, *supra* note 9, ch. IV; D. BAUM, *supra* note 2, at 29-37; 1 M. HANDLER, *supra* note 2, at 522-28, 560-64; F. ROWE, *supra* note 5, ch. 9; 16C J. VON KALINOWSKI § 32.02.

[52]*Cf.* 438 F.2d at 1374. Beatrice also raised the cost justification defense provided by section 2(a). The FTC did not consider this defense from Beatrice's position, but did consider the cost study in passing on the charges against Kroger. 76 F.T.C. at 812. *See* text accompanying notes 127-32 *infra* for a discussion of the cost justification defense.

[53]404 U.S. 871 (1971).

[54]346 U.S. 61 (1953).

in a companion section 2(a) proceeding.[55] Although the *Kroger* case is an important decision that must be noted by all buyers, claims that the decision outlaws hard bargaining among buyers and sellers should be rejected as mere hyperbole. The facts of the case clearly established that Kroger's Charleston Division purchasing manager was furnishing *false* price information to Beatrice, that is, that Kroger was lying rather than engaging in hard bargaining. Greed apparently played a role here since Beatrice's initial quote to Kroger on the dairy products was lower than any bid Kroger had received from potential dairy product suppliers and in fact was lower than several subsequent quotes from Beatrice's competitors. The initial Beatrice bid was, of course, higher than the ultimate bid accepted by Kroger.[56] If Kroger's conduct was to receive judicial approval it would, according to the court:

> [P]ut a premium on the buyer's artifice and cunning in inducing discriminatory prices. . . . In order for the buyer to be sheltered through the exoneration of the seller under section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view but also from that of the buyer. To hold otherwise would violate the purposes of the Act, and frustrate the intent of the Congress.[57]

The court was presented with the argument that such a decision would place buyers in peril whenever they engage in price bargaining. The language of the FTC decision was, to be sure, couched in terms of "hard bargaining,"[58] but the court correctly pointed

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[55]438 F.2d at 1374, *See, e.g.*, C. AUSTIN, *supra* note 9, at 161-62; D. BAUM, *supra* note 2, at 69; J. MCCORD, COMMENTARIES ON THE ROBINSON-PATMAN ACT 96 (1969); Rowe, *Pricing and the Robinson-Patman Act*, 41 ANTITRUST L.J. 98, 103-04 (1971).

[56]76 F.T.C. at 776-89; 438 F.2d at 1375-77. Discounts on some items in Broughton Dairy's initial bid might have amounted to the 20% discount representation made to Beatrice, but not on all items and not on the important gallon jug of milk. 76 F.T.C. at 776-77.

[57]438 F.2d at 1377.

[58]*See, e.g.*, 76 F.T.C. at 794-96, 810, 818. As the Commission pointed out:

> We think the summary of the negotiations . . . set out above in this opinion amply demonstrate that Kroger bargained too hard—not because it was able to wring an oppressive contract out of a weak seller, but because it did not have a sufficient regard for its Robinson-Patman obligations. If a buyer chooses to use its bargaining power to get favored treatment from its suppliers, it is permitted to do so under the law. Normally the seller must bear the responsibility for seeing that Robinson-Patman requirements are complied with. At

out that "[t]he controlling point here is not the 'hard bargaining' nor the 'price levels' but the *misrepresentation* of the Broughton bid, in order to induce a discriminatory price."[59] The *Kroger* decision, then, is not a command against hard bargaining by large power buyers but rather a warning as to the risks that obtain when such buyers act dishonestly. The proper response to the *Kroger* decision is complete honesty. It does not seem too difficult, at least academically, to distinguish between hard bargaining and lying and misrepresentation, but purchasers who fail to see this distinction court disaster.

Actually the "solo tango," to paraphrase a short squib in the issue of *Purchasing Week* reporting the Supreme Court's denial of certiorari in *Kroger*,[60] may well be the rare case. Unless the seller is fortunate enough to deal with a buyer who can completely disguise the facts and simultaneously exert extreme pressure, it is unlikely that the seller will be able to establish the good faith element of the meeting competition defense. The "good faith" element of section 2(b) mandates the seller to act as a "prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity."[61] At a minimum, the seller must make some effort to substantiate that the alleged competitor's bid was in fact made, and taking the buyer's word at face value will not suffice.[62] Beatrice was able to substantiate the defense, perhaps because the proposals covered a diversity of products and services and as such were to some extent inherently incomparable.[63]

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some point, however, if the buyer continues to push, he must become liable if Robinson-Patman bounds are exceeded. And this is so even though the seller had lived up to his Robinson-Patman obligations by maintaining the good faith required for a Section 2(b) defense.

Id. at 818.

[59]438 F.2d at 1378.

[60]PURCHASING WEEK, Oct. 18, 1971, at 4.

[61]Continental Baking Co., 63 F.T.C. 2071, 2163 (1963). *See also* FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 759-60 (1945); Forster Mfg. Co. v. FTC, 335 F.2d 47, 56 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965).

[62]*See* Viviano Macaroni Co. v. FTC, 411 F.2d 255, 259-60 (3d Cir. 1969), in which the court concluded that respondent had not shown the requisite good faith in failing to investigate or verify the veracity of a buyer who reported a competitive offer in an oral communication, and in failing to verify a competitive offer reported by an experienced salesman who had been with the company for eighteen years. *See also* Wall Prods. Co. v. National Gypsum Co., 326 F. Supp. 295 (N.D. Cal. 1971).

[63]76 F.T.C. at 789-90, 811.

However, in most cases it would seem that reasonable diligence would lead to a discovery of the falsity of a claimed bid or offer.

It should be noted that a buyer withholding information from a seller runs a risk too. In a pending proceeding, *In re Great A & P Tea Co.*,[64] the FTC has charged the A & P Company with knowingly inducing discriminatory prices from Borden Company for private label dairy products sold in A & P Chicago Division stores. The FTC alleged in its complaint that, when Borden submitted the final bid to A & P, a Borden Company official told the A & P representative that the offer was being made "to meet competition in the form of an existing offer or offers then in A & P's possession."[65] According to the complaint, A & P accepted the Borden offer knowing full well, but without so notifying Borden, that the bid was substantially lower than the bid offered by the only other competitive bidder.[66] On its face, the complaint against A & P goes beyond the *Kroger* situation since it does not allege that A & P had made any affirmative statements to Borden about receiving a lower bid. In other words, A & P simply permitted Borden to operate under a misconception. A & P, of course, denied the allegations and contended that it could rely on Borden's representation that the lower prices were lawful, and that it should not be held to the knowledge that Borden was relying on the meeting competition defense.[67] Specifically, A & P claimed that "Borden did not disclose to A & P in any manner reasonably calculated to inform A & P that it was Borden's position that the only justification for the prices for private label milk and other dairy products sold by Borden to A & P was 'meeting competition.'"[68]

The FTC complaint also charged A & P and Borden with "combining" to stabilize prices of dairy products in violation of section 5 of the FTC Act. This allegation was based on A & P's failure to pass the discounts on to its customers and Borden's failure to make available comparable discounts to other food stores in the Chicago market.[69] This aspect of the proceeding goes beyond the Robinson-Patman Act price discrimination issue and gets into

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[64] [1970-1973 Transfer Binder] TRADE REG. REP. ¶¶ 19,639, 19,826 (F.T.C. 1971) (No. 8866).

[65] *Id.* ¶ 19,639, at 21,685.

[66] *Id.*

[67] *See* E. Kintner, L. Henneberger, & M. Fleischaker, "Power Buyers" and the Robinson-Patman Act, Feb. 8, 1974, at 9 n.4.

[68] *Id.*

[69] [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,639, at 21,686.

the price fixing area proscribed by the Sherman Antitrust Act.[70] It is impossible to predict whether the A & P complaint theory that there is an affirmative duty on the buyer to clear up the seller's misconceptions will pass muster. It may be that A & P made some representations to Borden concerning competitive bids, and, if this were the case, then the *Kroger* decision will control. The most recent significant development in the proceeding was the denial of A & P's motion to dismiss on January 19, 1973.[71]

If the seller cannot successfully raise the meeting competition defense, then the specific issue of *Kroger* does not arise.[72] If the defense does not prevail, the ultimate liability of the buyer under section 2(f) depends on the presence of a section 2(a) violation by the seller which was knowingly induced or received by the buyer.[73]

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[70]15 U.S.C. § 1 (1970). The FTC does not have specific statutory authority to enforce the Sherman Act, but it is well settled that conduct prohibited by that Act constitutes "unfair methods of competition" cognizable under section 5 of the FTC Act. FTC v. Cement Institute, 333 U.S. 683, 690-91 (1948); L.G. Balfour Co. v. FTC, 442 F.2d 1 (7th Cir. 1971). *See generally* text accompanying & authorities cited note 7 *supra;* ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 253-54.

[71][1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,201 (F.T.C. 1973). There have been several procedural rulings in Docket 8866 subsequent to January 19, 1973. Borden filed suit in the Federal District Court for the Northern District of Illinois, Cause No. 73-C-1187, seeking a determination that the FTC was without authority to proceed under its complaint. Counts I and II of the Borden complaint were dismissed, respectively, on June 7, 1973, and October 19, 1973. The Seventh Circuit affirmed the dismissal of the complaint on May 1, 1974. Borden, Inc. v. FTC, 1974 Trade Cas. ¶ 75,036 (7th Cir. 1974). The court noted that the FTC had presented its case in chief and that Borden's defense was scheduled to begin on March 4, 1974.

[72]Of course, meeting competition does not mean beating competition and a seller can neither undercut the price of a comparable product nor drop the price of a premium product to the level of the price of an inferior product offered by a competitor. National Dairy Prods. Corp. v. FTC, 395 F.2d 517 (7th Cir.), *cert. denied,* 393 U.S. 977 (1968); FTC v. Standard Brands, Inc., 189 F.2d 510 (2d Cir. 1951). To be sure, the requirement is not draconian. It has been interpreted liberally in light of competitive realities and the defense has obtained when the seller has technically "beat" his competitor's price. *See, e.g.,* Callaway Mills Co. v. FTC, 362 F.2d 435 (5th Cir. 1966); Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 155), *cert. denied,* 350 U.S. 991 (1956). In fact, the Commission recognized that Beatrice "at least technically 'beat' the competitors" in the *Kroger* case but still allowed the defense. 76 F.T.C. at 811-12. The key here was Beatrice's showing of "good faith."

[73]Section 2(a) provides in pertinent part that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to dis-

The elements of a section 2(a) violation by the seller are, in capsule form, that there must be two or more consummated sales[74] of commodities[75] of like grade and quality[76] made at discriminatory, meaning different prices[77] by the same seller[78] to two or more different

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> criminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

15 U.S.C. § 13(a) (1970).

[74]*See* Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 755 (1947); Atalanta Trading Corp. v. FTC, 258 F.2d 365, 372-73 (2d Cir. 1958). Individual refusals to deal by a seller are not actionable as discriminations under a specific proviso of section 2(a), Shaw's Inc. v. Wilson-Jones Co., 105 F.2d 331 (3d Cir. 1939), but concerted refusals to deal are actionable under the Sherman Act. *See* Klor's Inc. v. Broadway-Hale Stores, Inc., 358 U.S. 809 (1959).

[75]"Commodities" includes tangible goods or products, not services. *See, e.g.*, Baum v. Investors Diversified Serv., Inc., 409 F.2d 872, 875 (7th Cir. 1969); Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center, Inc., 219 F. Supp. 400 (W.D. Pa. 1963). For an extensive list of cases classifying various items as commodities, or as "noncommodities," see 16B J. VON KALINOWSKI § 24.05.

[76]Conflicting views on the proper criteria for determining like grade and quality were resolved in favor of the objective "physical characteristics" test in FTC v. Borden Co., 383 U.S. 673 (1966). *See* text accompanying & authorities cited notes 98-107 *infra.*

[77]There were also conflicting views as to the exact scope and meaning of "discrimination" under the Robinson-Patman Act until the Supreme Court's decision in FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960), in which it was held that "a price discrimination within the meaning of [section 2(a)] is merely a price difference." *Id.* at 549. Thus, the Court rejected the authorities and commentators who contended that predatory intent or competitive injury were prerequisites to a statutory "price discrimination." The Court also decided against the economists who urge that economic discrimination occurs "when the profit contribution is not the same for all sales of a product; some sales are more profitable than others." Backman, *An Economist Looks at the Robinson-Patman Act*, 17 A.B.A. ANTITRUST SECTION 343, 344 (1960). In other words, there might not be economic price discrimination when prices differ, but there might be even though prices are the same. *See generally* 16C J. VON KALINOWSKI §§ 27.01-.02.

[78]*See, e.g.*, Walker Oil Co. v. Hudson Oil Co., 414 F.2d 588, 590 (5th Cir. 1969); National Lead Co. v. FTC, 227 F.2d 825 (7th Cir. 1955); Mas-

purchasers[79] in reasonably close time proximity,[80] at least one of which sales crosses a state line,[81] for use, consumption or resale within the United States or any territory thereof.[82] It is important to note that transactions such as leases or consignments, as long as they are not disguised sales, are not covered by the Act.[83] The Act has been construed as not being applicable to sales to the

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sachusetts Brewers Ass'n v. P. Ballantine & Sons, 129 F. Supp. 736 (D. Mass. 1955). *See* text accompanying note 88 *infra.*

[79]Usually determining whether a person is a "purchaser" for Robinson-Patman Act purposes presents no problems, but there are circumstances in which purchasers from wholesalers or distributors will be deemed "indirect purchasers" from the manufacturer. Hiram Walker, Inc. v. A. & S. Tropical, Inc., 407 F.2d 4 (5th Cir.), *cert. denied,* 396 U.S. 901 (1969); Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937). The key to the application of the indirect purchaser doctrine is the manufacturer's control over the sales policies of the distributor even if they are ostensibly unrelated. The supplier who is responsible for the prices of the distributor will be held accountable for any resulting competitive injury. The "indirect purchaser" doctrine in essence complements the "single seller" doctrine applied to parent-subsidiary relationships and the same factors are considered in determining whether the requisite control exists. *Cf.* FTC v. Fred Meyers, Inc., 390 U.S. 341 (1968). *See generally* F. ROWE, *supra* note 5, § 4.5; 16B J. VON KALINOWSKI § 24.04[3]. *See also* text accompanying note 87 *infra.*

[80]Atalanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958); Valley Plymouth v. Studebaker-Packard Corp., 219 F. Supp. 608, 610 (S.D. Cal. 1963); 1955 REPORT, *supra* note 2, at 178. Essentially, the requirement is satisfied if both the sales agreements and the delivery of the commodities involved occur reasonably simultaneously. "Closeness" is required—not exactly simultaneous sales. Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916, 921 (5th Cir. 1952). Otherwise, the Robinson-Patman Act would be effectively emasculated.

[81]*See* text accompanying notes 110-12 *infra.*

[82]Section 1 of the Clayton Act, 15 U.S.C. § 12 (1970), defines "commerce" as including trade with foreign nations. Thus, the specific language of section 2(a) exempts export sales discriminations, but such sales may be subject to other provisions of the Act. *See, e.g.,* Baysoy v. Jessop Steel Co., 90 F. Supp. 303 (W.D. Pa. 1950), in which an export sales agreement was held to violate the brokerage provision of section 2(c). Import sales are covered by the Act. *See, e.g.,* Matter of Siemens & Halske A.G., 155 F. Supp. 897 (S.D.N.Y. 1957). *See generally* 16C J. VON KALINOWSKI §§ 26.01[1], 26.03.

[83]*See, e.g.,* Students Book Co. v. Washington Law Book Co., 232 F.2d 49 (D.C. Cir. 1955), *cert. denied,* 350 U.S. 988 (1956); Gaylord Shops, Inc. v. Pittsburg Miracle Mile Town & Country Shopping Center, Inc., 219 F. Supp. 400, 403, 404 (W.D. Pa. 1963). Of course, an "agency" or "consignment" label will not insulate a transaction that is in fact a sale. Western Fruit Growers Sales Co. v. FTC, 322 F.2d 67 (9th Cir. 1963). For an extensive analysis of the factors considered in resolving this issue, see 16B J. VON KALINOWSKI § 24.03[2].

federal government.[84] There are conflicting opinions regarding its application to sales to states and other governmental units, but generally such sales have been excluded from Robinson-Patman liability.[85] Section 4 of the Robinson-Patman Act grants limited exemptions to cooperative associations.[86] Non-profit institutions such as schools, libraries, and hospitals, purchasing supplies for their own use, were specifically exempted from the Act by legislation adopted in 1938.[87]

The requirement that the sales must be made by the "same seller" often conjures up an easy way to avoid liability under the Act. It seems that one could create a selling subsidiary to deal with the vast majority of customers and could reserve to the parent favored customers who will receive preferential treatment. In theory, the Act allows sufficient freedom in pricing to accomplish this and, in fact, the stratagem has worked. However, it is not without risk, since to avoid liability the subsidiary must have a great deal of independence, perhaps more than exists in the real

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[84]General Shale Prods. Corp. v. Struck Constr. Co. 37 F. Supp. 598 (D. Ky. 1941), *aff'd*, 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943); Sperry Rand Corp. v. Nassau Research & Dev. Associates, 152 F. Supp. 91, 96 (E.D.N.Y. 1957); Opinion of United States Attorney General, 1932-1939 Trade Cas. ¶ 44,145 (1936). However, in Sterling Nelson & Sons v. Rangen, Inc., 351 F.2d 851, 859 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966), the court indicated that the Act might apply if the Government is the victim, not the beneficiary, of the discrimination. *See* F. ROWE, *supra* note 5, § 4.11; 16B J. VON KALINOWSKI § 24.06[1].

[85]*Compare* Sacks v. Brown-Forman Distillers Corp., 134 F. Supp. 9, 16 (S.D.N.Y. 1955), *aff'd per curiam*, 234 F.2d 959 (2d Cir.), *cert. denied*, 352 U.S. 925 (1956), *and* Opinion of Attorney General of Minnesota, 1932-1939 Trade Cas. ¶ 55,157 (1937), *with* Opinion of Attorney General of California, 1932-1939 Trade Cas. ¶ 55,156 (1937). *See* F. ROWE, *supra* note 5, § 4.12; 16B J. VON KALINOWSKI § 24.06[2].

[86]15 U.S.C. § 13(b) (1970). *See* Quality Bakers of America v. FTC, 114 F.2d 393, 400 (1st Cir. 1940). For a discussion of the ramifications of this exemption, see 1955 REPORT, *supra* note 2, at 311; F. ROWE, *supra* note 5, §§ 14.2, 14.8; 16D J. VON KALINOWSKI § 36.03[3].

[87]15 U.S.C. § 13(c) (1970). Because of the chronology, this provision has been construed as adding to existing exemptions. General Shale Prods. Corp. v. Struck Constr. Co., 37 F. Supp. 598 (D. Ky. 1941), *aff'd*, 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943). The provision has been broadly construed to include anything required to meet the needs of the institution. Logan Lanes, Inc. v. Brunswick Corp., 378 F.2d 212 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967). However, it has been held inapplicable if the institution is reselling for a profit. Students Book Co. v. Washington Law Book Co., 232 F.2d 49 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956).

world of parent-subsidiary relationships, in setting prices and terms of sales.[88]

It should be emphasized that, even in cases in which the two major and the several minor defenses and exemptions do not obtain,[89] section 2(a) does not prohibit all price discriminations. The crux of the Act is that the price discrimination must have a prescribed adverse effect on competition and, to be unlawful, must satisfy at least one of the statutory tests. A discrimination violates section 2(a) if its effect "may be substantially . . . to lessen competition or tend to create a monopoly in any line of commerce,"[90] or to injure, destroy or prevent competition with any person who "grants" the discrimination,[91] with any person who "knowingly

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[88]Neither share ownership, Warren Petrol. Corp., 53 F.T.C. 268 (1956), nor common directors or officers, National Lead Co. v. FTC, 227 F.2d 825 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957); Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541 (E.D.N.Y. 1957), are sufficient, standing alone, to make the parent accountable for discriminatory sales. However, even these cases recognize that a parent corporation actively controlling or at least contributing to the subsidiary's pricing or distribution policy will justify disregarding the corporate fiction. It is certainly not inconceivable that the explanation of the results in these cases is that they were poorly prosecuted or superbly defended. The parent-seller runs another risk. If it successfully shows that it did not control its subsidiary, then it might be liable for direct discrimination between different purchasers or customers if the subsidiary gets price or allowance benefits not available to others. *Cf.* Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541, 542 (E.D.N.Y. 1957). For an analysis of the cases involving the "single seller" issue, see 16B J. VON KALINOWSKI § 24.04[2][a], particularly the helpful guidelines, *id.* § 24.04, at 24-45.

[89]In addition to the section 2(a) cost justification defense, notes 127-32 *infra*, the section 2(b) meeting competition defense, notes 48-52 *supra*, and the governmental, cooperative association and nonprofit institution exemptions, notes 85-87 *supra*, the fourth and last proviso of section 2(a) justifies otherwise unlawful price discriminations made in response to changing conditions affecting the market for the goods concerned or the marketability of those goods. The proviso specifically refers to several possibilities, such as a deterioration of perishable goods and obsolescence of seasonal goods. *See generally* 16C J. VON KALINOWSKI § 32.04. Also the FTC and the courts have recognized, albeit somewhat vaguely, a de minimis rule. *See* E. Edelmann & Co. v. FTC, 239 F.2d 152, 155 (7th Cir. 1956); Alterman Foods, Inc. [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,248 (F.T.C. 1973); American Metal Prods. Co., 60 F.T.C. 1667 (1962). It should be noted that section 2(a) qualifies the cost justification defense by authorizing the FTC to set quantity limits on particular commodities even when cost justified. *See generally* 16C J. VON KALINOWSKI § 32.03[5].

[90]15 U.S.C. § 13(a) (1970).

[91]*Id.* This is the so-called primary line or seller level injury.

receives the benefit of the discrimination,"[92] or with "customers of either of them."[93] The "may" in section 2(a) clearly does not mean a "mere" or "remote possibility."[94] However, the interpretation of the word, depending on the forum and the circumstances, has ranged from "reasonable possibility"[95] to "reasonably probable."[96] Of course, without running afoul of the Act, different prices may legally be offered to customers who clearly occupy different places in the distribution chain, such as wholesalers, distributors, or direct buying retailers.[97]

One of the basic requirements for section 2(a) liability is that the commodities must be of "like grade and quality."[98] This element is necessary to insure that the price discrimination

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[92]*Id.* This is the so-called secondary line or customer level injury.

[93]*Id.* This is the so-called tertiary line or customer's buyer level injury.

[94]*See, e.g.*, Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967); Corn Prods. Ref. Co. v. FTC, 324 U.S. 726, 738 (1945); American Oil Co. v. FTC, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964). *See generally* 16C J. VON KALINOWSKI § 28.05.

[95]The leading authority favoring this construction is FTC v. Morton Salt Co., 334 U.S. 37 (1948). The "test" was impliedly reaffirmed in a 1967 Supreme Court decision. Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967). *See also* American Motors Corp. v. FTC, 384 F.2d 247, 251 (6th Cir. 1967), *cert. denied*, 390 U.S. 1012 (1968); Forster Mfg. Co. v. FTC, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965).

[96]Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965). The FTC itself appears to have opted for the "reasonably probable" test—at least for the present. *See, e.g.*, General Foods Corp., 50 F.T.C. 885, 887 (1954).

[97]*See, e.g.*, Guyott Co. v. Texaco, Inc., 261 F. Supp. 942, 950 (D. Conn. 1966); Krug v. International Tel. & Tel. Corp., 142 F. Supp. 230 (D.N.J. 1956); Doubleday & Co., 52 F.T.C. 169 (1955). *See generally* ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 157-62; F. ROWE, *supra* note 5, at 174-75; 16C J. VON KALINOWSKI § 30.02[2]. The reference is to secondary line cases. Conceivably a discount granted to customers at a particular level in the distribution chain might result in a primary line violation if the customer classification and discount amount were aimed at the seller's competitors. Furthermore, it should be noted that discounts granted to dual function distributors, *i.e.*, wholesalers who also retail, can be successfully challenged under section 2(a) if not cost justified. *See, e.g.*, Mueller Co. v. FTC, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); E. Edelmann & Co., 51 F.T.C. 978 (1955), *aff'd*, 239 F.2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958). Also challengeable under section 2(a) are arrangements in which direct buying customers farther down the chain get greater discounts than available to customers higher up. *See, e.g.*, Krug v. International Tel. & Tel. Corp., *supra.*

[98]15 U.S.C. § 13(a) (1970).

law is confined to reasonably comparable business transactions.[99] The leading authority on the issue is the Supreme Court's 1966 decision in *FTC v. Borden Co.*,[100] which held that the test of like grade and quality is the physical identity or characteristics of the commodities involved. The Court upheld the FTC's determination that Borden's name brand condensed milk and its physically and chemically identical private label milk were of like grade and quality notwithstanding that the latter sold at a much lower price in the food stores. The Fifth Circuit Court of Appeals had set aside the FTC order on the ground that economic factors and consumer preferences had not been considered in passing on this jurisdiction element.[101] The wisdom of ignoring brand names and trademark differences in considering the like grade and quality element has been questioned[102] but, for better or for worse, the issue has been resolved. The *Borden* case does not make such differences totally irrelevant in Robinson-Patman cases; the Supreme Court recognized that they could be considered in the context of the more flexible "injury to competition" issue.[103] In fact, Borden ultimately prevailed on remand to the Fifth Circuit because the discrimination in price between the two condensed milks did not cause the requisite injury to competition.[104]

The like grade and quality requirement does give the buyer some freedom in price bargaining if he has product specifications that differ significantly from those of the supplier's usual product.[105] It is particularly helpful if the differences have some

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[99]1955 REPORT, *supra* note 2, at 157.

[100]383 U.S. 637 (1966). *See generally* 16C J. VON KALINOWSKI § 25.02.

[101]Borden Co. v. FTC, 339 F.2d 133, 136-37 (5th Cir.), *rev'g* 64 F.T.C. 534 (1964).

[102]The commentators have produced prodigious writings on the points. So much so that in the *Borden* case the Supreme Court engaged in a battle of footnotes—the majority emphasizing the numbers, particularly those supporting the position of the majority of the Attorney General's Committee, 383 U.S. at 640 n.3, and the dissenters urging that most of the supportive writings were not really relevant or on point. *Id.* at 652 n.8. *See also* 16C J. VON KALINOWSKI § 25.01, at 25-3 n.2.

[103]383 U.S. at 646.

[104]381 F.2d 175 (5th Cir. 1967). For a recent case involving this issue, see Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97 (10th Cir. 1973).

[105]The courts and the Commission recognize that physically dissimilar products are not of like grade and quality. *See, e.g.*, Lubbock Glass & Mirror

substantial effect on the marketability or consumer acceptance of the item.[106] The 1955 *Attorney General's Report on the Antitrust Laws* stated that: "Actual and genuine physical differentiations between two different products adapted to the several buyers' uses, and not merely a decorative or fanciful feature, probably remove differential pricing of the two from the reach of the Robinson-Patman Act."[107] It is this author's opinion that this observation is still sound.

The plaintiff in a section 2(f) case, in order to prevail, must establish three requirements in addition to the elements of a section 2(a) violation. These elements, by the terms of section 2(f) and judicial construction, are that the buyer must be engaged in interstate commerce, that the purchase in question must have been made in the course of such commerce, and, most importantly, that the buyer who induced or received the price must have had actual or constructive knowledge that the price differential given by the seller was violative of section 2(a).[108] It is not enough merely to show that the buyer knew that his price was lower than prices charged to other buyers. The illegality of the price must be shown.[109]

The wording of the commerce requirement of section 2(f) theoretically makes it more difficult to prosecute a buyer than

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Co. v. Pittsburgh Plate Glass Co., 313 F. Supp. 1184 (N.D. Tex. 1970); Universal Rundle Corp., 65 F.T.C. 924, 954-55 (1964), *order set aside and remanded on other grounds*, 352 F.2d 831 (7th Cir. 1965), *rev'd and remanded on other grounds*, 387 U.S. 244 (1967).

[106]Interestingly enough, although consumer preferences are irrelevant if the products are physically identical, they are appropriate in evaluating whether a minor physical difference is "merely decorative or fanciful" or in fact affects the marketability of the product. *See, e.g.*, Central Ice Cream Co. v. Golden Rod Ice Cream Co., 184 F. Supp. 312 (N.D. Ill. 1960), *aff'd*, 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961); Universal Rundle Corp., 65 F.T.C. 924, 954-55 (1964), *order set aside and remanded on other grounds*, 352 F.2d 831 (7th Cir. 1965), *rev'd and remanded on other grounds*, 387 U.S. 244 (1967).

[107]1955 REPORT, *supra* note 2, at 158. *See generally* 16C J. VON KALINOWSKI § 25.02[2].

[108]15 U.S.C. § 13(f) (1970).

[109]Section 2(f) does not specifically provide that the buyer must know of the illegality of the price. This gloss was imparted by the Supreme Court's decision in Automatic Canteen Co. of America v. FTC, 346 U.S. 61 (1953). *See* discussion of *Automatic Canteen*, text accompanying notes 114-17 *infra*. For discussion of the commerce requirement of section 2(f), see C. AUSTIN, *supra* note 9, at 159-61; F. ROWE, *supra* note 5, § 14.6; 16D J. VON KALINOWSKI § 36.04.

a seller for violating the Act.[110] The requirement is no doubt satisfied when the buyer purchases from a seller located in another state even if the buyer resells only locally. At least that purchase transaction would be in the "course of such commerce." However, a buyer purchasing from a seller located in the same state who sells at higher prices to the buyer's out-of-state rivals, in theory, would not be culpable under section 2(f) although the seller has presumably violated section 2(a).[111] Of course it is possible that the courts will harmonize seller and buyer liability in the same transaction notwithstanding the literal language of section 2(f).[112]

As noted, the key to section 2(f) liability is the buyer's knowing inducement or receipt of the discriminatory price. Initially, FTC enforcement of section 2(f), which was not very

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[110]Section 2(a) requires that the seller be engaged in commerce, that the discrimination occur in the course of such commerce, and that either or any of the purchases involved be in commerce. This is a narrower jurisdictional grant than obtains under the Sherman Act which applies to transactions effecting interstate commerce even if completely local in nature. *See* Willard Dairy Co. v. National Dairy Prods. Corp., 309 F.2d 943, 946 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963). Although the jurisdiction requirement is tripartite, the crucial element is that one of the challenged sales must be in commerce since if the defendant has made such a sale, the first two requirements are satisfied ipso facto. Liquilux Gas Serv. v. Tropical Gas Co., 303 F. Supp. 414, 416 n.2. (D.P.R. 1969). It is irrelevant whether the higher or lower priced sale is the interstate transaction. Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954). *Moore* appeared to have broadened the scope of section 2(a) by holding that the commerce requirement had been satisfied when the seller financed purely local predatory price cutting from interstate operations. However, the lower courts have been reluctant to read *Moore* expansively and even the Supreme Court seems to have had second thoughts. *See* Willard Dairy Co. v. National Dairy Prods. Corp., 373 U.S. 934 (1963) (Black, J., dissenting from the denial of certiorari); Littlejohn v. Shell Oil Co., 483 F.2d 1140, 1144 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973); Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785, 787 (10th Cir. 1967); Borden Co. v. FTC, 339 F.2d 953, 955 (7th Cir. 1964); Liquilux Gas Serv. v. Tropical Gas Co., *supra*, at 417. *See generally* 16C J. VON KALINOWSKI §§ 26.01[2], 26.02; Comment, *The Interstate Commerce Requirement of Section 2(a) of the Robinson-Patman Act*, 44 U. COLO. L. REV. 607 (1973).

[111]*See, e.g.*, Central Ice Cream Co. v. Golden Rod Ice Cream Co., 184 F. Supp. 312, 319 (N.D. Ill. 1960), *aff'd*, 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961).

[112]Rowe has made such a suggestion in his volume on the Robinson-Patman Act noting that such a construction would obviate recourse to section 5 of the FTC Act which would apply since buyers in other states would be prejudiced by the discrimination. F. ROWE, *supra* note 5, at 437-38. *See* text accompanying note 32 *supra*.

extensive, emphasized receipt of the favorable price.[113] However, the Supreme Court, in *Automatic Canteen,* shifted the emphasis to the culpability of the buyer. To paraphrase the Supreme Court, the buyer is guilty of violating section 2(f) if he knows the price induced was illegal or not within one of the defenses available to the seller.[114] The second half of this statement was fatal in the *Kroger* case—Kroger knew that the dairy prices were not legitimately within the meeting competition defense of Beatrice since Kroger's manager had misrepresented the competitive bids. Kroger knew of the flaw in Beatrice's ostensibly perfect defense.[115] The same can be said of A & P in the pending FTC proceeding, even though its position evokes more sympathy, if, as alleged, A & P knew that Borden was acting under a misconception.[116] As the Court in *Automatic Canteen* further observed, "the buyer whom Congress in the main sought to reach was the one who, knowing well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices."[117] This observation clearly applied to Kroger and almost as clearly to A & P.

The concept of "inducing or receiving a price discrimination" does not cover every situation in which a seller nets less from one customer than from another. In *Kapiolani Motors, Ltd. v. General Motors Corp.,*[118] a defendant in a Sherman Act antitrust suit counterclaimed against Kapiolani, a Pontiac dealer, alleging that false and fraudulent warranty claims reduced General Motor's net receipts from sales to Kapiolani as compared to net receipts from sales to the defendant competitor. The result of the false claims was, allegedly, tantamount to a reduced price on the purchased cars. The court indicated that it was a "nice try" by the defendant but, even given the *Kroger* precedent, concluded that the Robinson-Patman proscription applied only to induced favorable "prices." The step to false warranty claims was too much to take.[119] The

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[113]See discussion of early section 2(f) cases in C. EDWARDS, *supra* note 29, at 486-501.

[114]Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 74 (1953).

[115]Kroger Co. v. FTC, 438 F.2d 1372, 1377 (6th Cir.), *cert denied,* 404 U.S. 871 (1971).

[116]*In re* Great A. & P. Tea Co., [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,639 (F.T.C. 1971).

[117]346 U.S. at 79.

[118]337 F. Supp. 102 (D. Hawaii 1972).

[119]*Id.* at 104. The court stated:

Kapiolani court noted that "[n]owhere in the legislative history of the Act does it indicate that Congress was worried about purchasers who would engage in fraud, misrepresentation, or actual stealing from suppliers to procure economic advantages only secondarily relevant to net prices."[120] However, the court went on to say that "the conduct charged here states a prima facie case of obtaining money by false pretenses, fraud, conversion and the like, but definitely not a case of 'inducing a price discrimination' "[121] It is doubtful that *Kapiolani* stands for the proposition that actual indirect price discriminations, such as favorable credit terms or conditions of sale, are not covered by section 2(f).[122]

Essentially, *Automatic Canteen* imposed a burden on the plaintiff, either private or the FTC, to come forward with some evidence that the defendant knew or should have known that the induced price was illegal. The reasoning of the Supreme Court is of solace to the buyer—the Court did not feel that it was an undue burden on the plaintiff to show that the defendant buyer was "not an unsuspecting recipient of prohibited discriminations."[123] Since a section 2(a) violation requires both a price discrimination and a competitive injury, the knowledge element of section 2(f) is also twofold. It must be shown that buyer knew or should have known

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Where the conduct in Kroger was specifically calculated to affect "price" as that term has been defined under the Robinson-Patman Act, *i.e.*, amount buyer actually pays for an item, here the alleged conduct has nothing to do with "price," as either General Motors or Kapiolani viewed the term.

Id.

[120] *Id.* at 103.

[121] *Id.* at 104.

[122] For examples of condemned indirect price discriminations, see Skinner v. United States Steel Corp., 233 F.2d 762 (5th Cir. 1956) (credit terms); American Can Co. v. Russellville Canning Co., 191 F.2d 38 (8th Cir. 1951) (freight allowance); Secatori's, Inc. v. Esso Standard Oil Co., 171 F. Supp. 665 (D. Mass. 1959). Indirect price discriminations must be distinguished from promotional allowances cognizable under sections 2(d) and 2(e). Although the line is not very clear the key to which provisions apply is whether the allowances or payments are connected with resale of the goods by the buyer, so that sections 2(d) or 2(e) would apply, or incidental to the initial sale so that section 2(a) would apply. *See* Chicago Spring Prod. Co. v. United States Steel Corp., 254 F. Supp. 83, 84-85 (N.D. Ill. 1965), *aff'd per curiam*, 371 F.2d 428 (7th Cir. 1966). In Centex-Winston Corp. v. Edward Hines Lumber Co., 447 F.2d 585 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972), discriminatory delays in delivery were held cognizable under section 2(e).

[123] 346 U.S. at 81. The FTC did not agree at first and dismissed a number of section 2(f) cases when *Automatic Canteen* was decided. *See* 16D

that he was receiving a price which was not cost justified or otherwise defensible and which was different from the price other buyers paid; it must also be shown that the buyer knew or should have known that the differential would have the effect of substantially lessening competition.[124] Although the substantiality of the discount does not, in and of itself, satisfy the lessening competition requirement,[125] the burden is often satisfied by showing a significant discrimination in a highly competitive industry with low profit margins. In *Kroger*, the discounts granted by Beatrice ranged up to forty-one percent on cottage cheese which, coupled with the strong competition and low profit margins in the retail food business, clearly demonstrated to the court the required adverse competitive effect.[126]

If the price difference were cost justified, this might give rise to a major affirmative defense to a section 2(a) violation.[127]

J. VON KALINOWSKI § 36.05[1], at 36-65 n.7. However, upon reflection the Commission realized that since the decision only involved the issue of the burden of introducing evidence, such burden could be satisfied by a showing that the buyer had reasonable knowledge as to the illegality of the seller's price. Consequently, the burden was not as onerous as originally thought and new section 2(f) proceedings were filed. *See, e.g.*, D & N Auto Parts Co., 55 F.T.C. 1279 (1959), *aff'd sub nom.* Mid South Distrib. v. FTC, 287 F.2d 512 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961). For general discussion of the burden of proof requirements under section 2(f), see ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 153-55; C. AUSTIN, *supra* note 9, at 158-64; D. BAUM, *supra* note 2, at 70-73; C. EDWARDS, *supra* note 29, at 501-11; 1955 REPORT, *supra* note 2, at 194-97; F. ROWE, *supra* note 5, § 14.7; 16D J. VON KALINOWSKI § 36.05.

[124]346 U.S. at 74.

[125]With a few exceptions this is the generally accepted rule even if the FTC v. Morton Salt Co., 334 U.S. 37 (1948), "inference technique" is applicable. *See* authorities listed in 16C J. VON KALINOWSKI § 31.01[1], at 31-8 n.23. The Second Circuit, and perhaps the Ninth Circuit, take the position that any discrimination among competing buyers is sufficient to establish a prima facie case under section 2(a). *See* Enterprise Indus., Inc. v. Texas Co., 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957); Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 735 (1945); Fowler Mfg. Co. v. Gorlich, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). For a discussion of *Morton Salt*, see text accompanying notes 142-43 *infra*.

[126]438 F.2d at 1378-80. In fact, the discounts received by Kroger were among the highest in litigated Robinson-Patman cases. *Id.* at 1379 n.4.

[127]The cost justification defense is established by the first proviso of section 2(a), 15 U.S.C. § 13(a) (1970), which provides "that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers

A seller may grant discounts to favored customers if the differential makes only due allowance for actual cost savings from the manufacture, sale, or delivery of the commodities, even if the discrimination does have the required adverse competitive effect.[128] The best example of cost savings that can be passed on to large volume buyers without jeopardy are carload freight rates.[129] A cost justification defense by a seller is not easy to sustain and, if one is attempted, good accountants are a necessity. The ostensible problem is that really workable criteria for application of the defense do not exist, and the courts have required accurate and actual, not estimated, data on the savings involved.[130] There has been some judicial broadening of the defense in that the use of average cost data for similar and legitimate customer groups has been permitted;[131] however, use of reasonable approximations rather than actual cost data is still not allowed.[132] The real problem, as might be suspected, is that the cost justification might first be considered after the FTC complaint had been filed. Some good advice to buyers, when a seller "offers" a substantial price break, is to insist on seeing the cost justification figures before the deal is consummated. Actually, the same advice may be given to sellers when a buyer asks for preferential prices, that is, the seller should be satisfied that the requested differential is cost justified before making the deal.

How does the plaintiff in a section 2(f) suit meet the burden of showing the requisite knowledge? The answer, contained in

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sold or delivered." For discussion of the problems presented by the defense and the various techniques developed in its use, see ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 131-35; C. AUSTIN, *supra* note 9, at 59-70; D. BAUM, *supra* note 2, at 22-25; C. EDWARDS, *supra* note 29, ch. 18; 1955 REPORT, *supra* note 2, at 170-76; F. ROWE, *supra* note 5, at 10; 16C J. VON KALINOWSKI § 32.02.

[128]It is well settled that the cost justification defense is absolute. United States v. Borden Co., 370 U.S. 460 (1962); Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61, 66-69 (1953).

[129]*See, e.g.*, Morton v. National Dairy Prods. Corp., 414 F.2d 403 (3d Cir. 1969), *cert. denied*, 396 U.S. 1006 (1970).

[130]*See* 1955 REPORT, *supra* note 2, at 171-75; 16C J. VON KALINOWSKI § 32.03[1], at 32-86 to 32-92. *See also* authorities cited note 127 *supra*.

[131]United States v. Borden Co., 370 U.S. 460 (1962). *See generally* 16C J. VON KALINOWSKI § 32.03[2].

[132]*See* 1955 REPORT, *supra* note 2, at 173-75 (recommending such a liberalization of the defense but with little impact); ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 133; 16C J. VON KALINOWSKI § 32.03[1], at 32-92 n.14.

Automatic Canteen, is "trade experience,"[133] that is, the expertise of the skilled purchasing manager who knows a great deal about the going price for the commodities being purchased. If a bid appears out of line to experienced purchasers, it should be avoided until a cost justification is shown. Specific examples of the kind of evidence that has enabled the FTC to prevail in section 2(f) cases may be helpful to purchasing managers attempting to avoid liability. In *Fred Meyer, Inc. v. FTC*,[134] the FTC's burden was met in a proceeding against a large volume buyer when it was shown that: (1) none of the suppliers granted quantity discounts as a matter of course, (2) the favored customer received the discounts only in the one month a year it conducted a special coupon promotional sale, and (3) the price concessions amounted to a full one-third off the regular price while cost savings to the sellers were at best negligible.[135] Other proceedings have involved buyers forming buying groups and paying lower prices for their purchases while the mode, quantity, or quality of their individual purchases remained unchanged. This line of cases is typified by the automobile parts cases such as *American Motors Specialities Co. v. FTC*.[136] In that case, several automobile parts distributors grouped together to solicit lower prices and favorable price differentials. They were successful in their efforts, and the FTC was successful in its section 2(f) prosecution, since competing unorganized jobbers were paying higher prices for goods sold in the same quantities by the same sellers in the same manner.[137] However, if a buying group performs some distributive functions and is not a mere ordering service, the members will be absolved of liability unless the FTC can present evidence negating the possibility that the differentials were cost justified. The buyers prevailed on this ground in another auto parts case, *Alhambra Motor Parts v.*

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[133]346 U.S. at 79-81. Trade experience is, to be sure, a somewhat amorphous concept but the Commission, largely in section 5 cases, and the courts have developed some standards. For general discussion on this issue, see ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 153-54; C. EDWARDS, *supra* note 29, at 515-17; 16C J. VON KALINOWSKI § 36.05[3][c].

[134]359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968).

[135]*Id.* at 363-67.

[136]278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960). *See also* Mid South Distrib. v. FTC, 287 F.2d 512, 518-19 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961).

[137]278 F.2d at 228-29.

FTC.[138] The key is that the FTC must show something that should have put the buyers on notice that the prices were not lawful and not cost justified.

As far as the competitive injury requirement is concerned, the burden of proof in a section 2(f) case can be satisfied, as in *Kroger*,[139] by showing price differentials of a kind that would cause or would be likely to cause the requisite injury to the seller's or buyer's competition. The simple cases are those in which the price concessions are great—it is not difficult to conclude, in a secondary line case, that a continuing one-third price reduction to a favored customer would benefit him vis-a-vis his competitors whether he passed on his savings or increased his profits.[140] In the primary line cases involving injury at the seller level, the clear case is one in which the seller has engaged in predatory, below-cost selling.[141] The hard secondary line cases are those involving the propriety of using the *FTC v. Morton Salt Co.*[142] inference technique. *Morton Salt* established the doctrine that if profit margins are small and the business is highly competitive, competitive injury can be, but does not necessarily have to be, inferred, even though the discounts are relatively insignificant and there is no evidence that disfavored retailers lost business or suffered financial loss. The technique is commonly utilized in cases involving the automobile parts and retail grocery industries.[143] It is a

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[138]309 F.2d 213 (9th Cir. 1962). *But see* General Auto Supplies, Inc. v. FTC, 346 F.2d 311 (7th Cir. 1965). On remand in *Alhambra*, the FTC, reimposing section 2(f) liability, ruled that there was no cost justification for individual jobbers, who were deemed the real purchasers, and that they possessed the requisite knowledge. Southern Cal. Jobbers, Inc., 68 F.T.C. 1039 (1965). *See generally* ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 158-59; 16D J. VON KALINOWSKI § 36.05[3], at 36-88 to 36-90.

[139]438 F.2d at 1379-80. *See* note 126 *supra*.

[140]*See, e.g.*, Corn Prods. Ref. Co. v. FTC, 324 U.S. 726 (1945); Whitaker Cable Corp. v. FTC, 239 F.2d 253, 255 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957) (discounts up to 30%). For a detailed analysis of the factors utilized in the evaluation of competitive effects at the buyer or secondary level, see 16C J. VON KALINOWSKI § 31.01[4].

[141]*See, e.g.*, Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967); Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 843 (7th Cir. 1961). Decisions involving predatory pricing and the factors used in evaluating the intent of the seller are discussed in 16C J. VON KALINOWSKI § 29.02[2].

[142]334 U.S. 37 (1948).

[143]For general discussion of *Morton Salt* and its progeny, see 16C J. VON KALINOWSKI §§ 31.01[2][a]-[b], 31.04[4]. *See also* ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 124-28; F. ROWE, *supra* note 5, at 180-86.

difficult technique to defend and, in fact, in *United Biscuit Co. v. FTC*,[144] direct testimony by unfavored grocery store customers that they were not injured by United Biscuit's cumulative discount structure was deemed legally insufficient to protect the seller from a section 2(a) violation.[145] If the courts and the Commisson do not deem the inference technique appropriate, they will, of course, attempt to ascertain if the competitive abilities of the unfavored customers have been impaired.[146] These inquiries often focus on the temporary or permanent nature of the discrimination, the causal nexus between the discrimination and the alleged injury, and the general availability of the challenged lower prices.[147] In other words, the health of the competitive process is examined in judging the impact of the discriminatory prices.

The hard primary line cases are those in which no predatory pricing is shown. Such cases also necessitate an examination of the health and vitality of the competitive system to determine if the discrimination had the requisite effect. A diversion of trade or loss of customers would be a factor considered by the courts or the Commission[148] but it does not establish a per se violation.[149] Loss of profits is a second important factor used to measure the impact of price discriminations on the seller's competition.[150] The structure of the particular market, including such factors as the

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[144]350 F.2d 615 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966).

[145]Of course it is possible that testimony to the effect that the disfavored customers were not injured might very well mean that they have been injured but for various reasons are not complaining. For other cases rejecting such rebuttal evidence, see Standard Motor Prods. Inc. v. FTC, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959); Moog Indus. Inc. v. FTC, 238 F.2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958); 16C J. VON KALINOWSKI § 31.01[2][c].

[146]*See, e.g.*, American Oil Co. v. FTC, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); Borden Co. v. FTC, 381 F.2d 175 (5th Cir. 1967); Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952).

[147]*See* cases cited note 146 *supra*. *See generally* ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 125; F. ROWE, *supra* note 5, §§ 8.3-8.5; 16C J. VON KALINOWSKI § 31.03[3][5].

[148]*See, e.g.*, Lloyd A. Fry Roofing Co., 68 F.T.C. 217, 260 (1965), *aff'd*, 371 F.2d 277 (7th Cir. 1966).

[149]Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 840 (7th Cir. 1961); Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786, 790 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952). For a general discussion of the "diversion theory," see 16C J. VON KALINOWSKI § 29.03[1].

[150]*See, e.g.*, Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967); Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 346 F.2d 611 (6th Cir.

number and strength of the competitors and even the availability of lower prices from others, have been considered in primary line cases.[151] Also, the relationship between the seller's two prices, when the higher price subsidizes operations in the affected market, has been examined.[152]

As noted earlier, section 5 of the FTC Act has been used to fill the gap in the coverage of the Robinson-Patman Act caused by the lack of a provision prohibiting buyers from inducting or receiving illegal promotional allowances or services. Section 2(d)[153] and 2(e)[154] of the Act prohibit a seller from granting promotional allowances or services to customers unless such allowances or services are available or accorded to all competing customers on proportionally equal terms. These sections establish per se offenses; thus, the cost justification defense is not available and no injury to competition need be shown.[155] Despite some problem with the literal language of section 2(b), the meeting competition defense is technically available for section 2(d) promotional allowances as well as for section 2(e) services.[156] However, successful recourse to this defense has been rare.[157]

There are several variations in sections 2(b) and 2(e), a few of which will be mentioned.[158] The seller's product need not be

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1965); H.J. Heinz Co. v. Beechnut Life Savers, Inc., 181 F. Supp. 452 (S.D.N.Y. 1960). *See generally* 16C J. VON KALINOWSKI § 29.03[2].

[151]For an analysis of this factor, see 16C J. VON KALINOWSKI § 29.03[3].

[152]The so-called "war chest" theory is more likely to be in issue in the predatory primary line cases. *See, e.g.*, Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954). However, generally it is still a factor in other cases to support a conclusion that section 2(a) has not been violated. *See, e.g.*, Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 842 (7th Cir. 1961); Balian Ice Cream Co. v. Arden Farms Co., 104 F. Supp. 796 (S.D. Cal. 1952), *aff'd*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956). *See generally* 16C J. VON KALINOWSKI § 29.03[4].

[153]15 U.S.C. § 13(d) (1970).

[154]*Id.* § 13(e).

[155]FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959).

[156]Exquisite Form Brassiere Co. v. FTC, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

[157]In fact, on remand the Commission held that Exquisite Form had failed to sustain the defense. Exquisite Form Brassiere Co., 64 F.T.C. 271 (1964). *See also*, Rabiner & Jontow, Inc. v. FTC, 386 F.2d 667 (2d Cir. 1967), *cert. denied*, 390 U.S. 1004 (1968). The defense was sustained in Continental Bakery Co., 63 F.T.C. 2071 (1963).

[158]For discussions of sections 2(d) and 2(e), see ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 147-52; C. AUSTIN, *supra* note 9, ch. VI; D.

resold in exactly the same form in which purchased for the provisions to apply.[159] Also, "available" means truly available in real world terms, and a promotional program will not pass muster if only a few favored customers can and will benefit.[160] Some leeway is permitted in formulating a promotional program, but the risks of illegality increase as the program deviates from being keyed into the dollar volume or quantity of goods purchased.[161] Thus, purchasing managers certainly may ask what promotional programs their suppliers have available, but should not ask for more, given the distinct possibility of a section 5 proceeding. The key to section 5 liability for inducing unlawful promotional allowances is the same as for section 2(f) liability for inducing price discrimination—the culpable knowledge of the recipient that the program or allowance was not offered on proportionally equal terms to his competition.[162]

Examples of programs that have been condemned under section 5 include *Grand Union Co. v. FTC*,[163] in which the company solicited suppliers to rent space on a spectacular advertising sign located in Times Square, *R. H. Macy & Co. v. FTC*,[164] in which Macy solicited gifts and contributions towards the cost of its 100th Anniversary celebration, even though the payments were made solely for institutional publicity, and *Furr's Inc.*,[165]

BAUM, *supra* note 2, at 50-65; C. EDWARDS, *supra* note 29, ch. 7; 1955 REPORT, *supra* note 2, at 189-93; F. ROWE, *supra* note 5, ch. 13; 16D J. VON KALINOWSKI chs. 34-45.

[159] *See, e.g.*, Corn Prods. Ref. Co. v. FTC, 144 F.2d 211, 219 (7th Cir. 1944), *aff'd*, 324 U.S. 726 (1945); Clairol, Inc., 69 F.T.C. 1009, 1046-49 (1966).

[160] *See, e.g.*, FTC v. Simplicity Pattern Co., 360 U.S. 55 (1954); State Wholesale Grocers v. Great A. & P. Tea Co., 258 F.2d 831, 839 (7th Cir.), *cert. denied*, 358 U.S. 947 (1958); Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir.), *cert denied*, 326 U.S. 773 (1945).

[161] *See, e.g.*, Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480 (2d Cir. 1962); Lever Bros., Inc., 50 F.T.C. 494 (1953). *See generally* Miller, *Sections 2(d) and 2(e) of the Robinson-Patman Act: Seller in a Quandary*, 45 MARQ. L. REV. 511 (1962). *See also* authorities cited note 158 *supra*.

[162] *See, e.g.*, Grand Union Co. v. FTC, 300 F.2d 92, 99-100 (2d Cir. 1962); Alterman Foods, Inc., [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,248 (F.T.C. 1973). The FTC need not prove injury to competition before section 5 can be invoked against a buyer since sections 2(d) and 2(e) define per se offenses.

[163] 300 F.2d 92 (2d Cir. 1962).

[164] 326 F.2d 445 (2d Cir. 1964).

[165] 68 F.T.C. 584, 660-62, 680 (1965).

in which a buyer soliciting promotional payments for a promotional extravaganza was found to have violated section 5 even though, on advice of his attorney, he had refrained from asking the suppliers if they were making similar allowances available to his competitors. In *Furr's*, however, this fact, plus respondent's good faith, influenced the Hearing Examiner and the Commission to dismiss the complaint without prejudice rather than enter a cease and desist order. In *Colonial Stores, Inc. v. FTC*,[166] the Fifth Circuit affirmed an FTC order that Colonial, a "multi-million dollar supermarket chain," unlawfully induced and received advertising allowances for a specific promotion which it knew or should have known had not been accorded to other purchasers on proportionately equal terms. In considering an assertion that the chain had no culpable knowledge that the advertising payments were discriminatory, the court observed that Colonial must have known of the character of the payments based on its past experience with the suppliers involved.[167] The allowances, the court noted, were obviously "add-on" promotional advantages, grossly disproportionate to the ordinary allowances these particular suppliers provided.[168] The purchases were far from the level that would produce the dollar amounts under the regular promotional programs of the suppliers and were so substantial that there "could be no reasonable possibility for the supplier to offer equivalent payments to competitors."[169] Again, trade experience of the buyer sufficed to impose liability.

An interesting argument made by Colonial centered on "clean bill of health" written assurances obtained from suppliers. Colonial contended that even if it were aware of facts creating a duty to inquire about the legality of the challenged promotional payments, it had satisfied that duty by requiring all suppliers to sign a printed contract that included a clause recognizing that the "same agreement is made available by the Vendor on a proportionally equal basis to all dealers in the competitive area."[170] Anyone using or contemplating adopting similar forms to insulate against FTC attack would be well advised to note carefully what the court had to say about them:

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[166]450 F.2d 733 (5th Cir. 1971).

[167]*Id.* at 745.

[168]*Id.* at 737-38, 741-42.

[169]*Id.* at 738.

[170]*Id.* at 739 n.11.

> [T]he requirement that a supplier sign such a representation is simply not sufficient, by itself, to offset actual knowledge of facts strongly suggesting, if not establishing, that despite disclaimers to the contrary the supplier is not offering proportionally equal payments to competitors. A written agreement, which by its nature is to be treated as a substitute for inquiry, cannot take the place of an independent investigation if, as found by the Commission, there are ample grounds for believing that the other party may not be complying with the requirements of the law. . . . [O]n that score no amount of written statements, disclaimers, protestations of clean health, noble purpose or purity of heart made by another could exculpate the recipient from bearing what the law imposes. When the warning signs are so clear, the recipient must either devise some practicable method for allaying its doubts—and thereby satisfying its duty of inquiry—or it must forego entirely the opportunity to solicit a lucrative but highly suspect promotional arrangement.[171]

In *Fred Meyer, Inc. v. FTC*,[172] promotional allowances also were involved. The Ninth Circuit's decision was appealed to the Supreme Court which did not disturb that portion of the order holding that a direct buying supermarket chain had violated section 5 when it successfully "pressured" sellers for promotional allowances not made available to the chain's smaller competitors who purchased the same products through wholesalers. This decision precipitated significant revisions of the FTC Guides for Advertising Allowances and Other Merchandising Payments and Services that were promulgated on May 29, 1969,[173] and amended on August 4, 1972.[174] These Guides, popularly known as the "Fred Meyer Guides," are designed to assist sellers in formulating promotional programs that make promotional benefits available to other than direct purchasers on proportionally equal terms. Literal compliance with the FTC Guides does not insulate sellers from

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[171] *Id.* at 746.

[172] 359 F.2d 351, 363 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968).

[173] 34 Fed. Reg. 8285 (1969).

[174] 37 Fed. Reg. 15699 (1972).

FTC attack,[175] but such compliance does reduce the likelihood of litigation.

At the outset of this Comment, reference was made to buyer liability under section 2(c)[176] of the Robinson-Patman Act. This is the brokerage provision of the Act which applies by its terms to both buyers and sellers.[177] Section 2(c) prohibits the granting or receiving of a "commission, brokerage or any allowance or discount in lieu thereof except for services rendered in connection with the sales or purchase of goods, wares or merchandise."[178] For years the conventional wisdom was that payments of commissions to any but pure brokers were per se illegal. However, some flexibility was introduced by the Supreme Court's decision in *FTC v. Henry Broch & Co.*,[179] but not enough to protect a buyer or seller if the seller's broker is eliminated and the price to a direct buying customer is reduced by the amount formerly paid as a commission.[180] Section 2(c) might not apply if the buyer were rendering some services to the seller which previously had been rendered by a broker, or if the reduction were, in part, the result of other reduced costs.[181] However, buyers should be wary since "receipt" is the key for section 2(c) liability,[182] not "knowing inducement" as in the section 2(f) or section 5 cases.

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[175]*See, e.g.*, FTC v. Mary Carter Paint Co., 382 U.S. 46, 47-48 (1965) (Guides Against Deceptive Pricing, 23 Fed. Reg. 7965 (1958)); *cf.* Alterman Foods, Inc., [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,248 (F.T.C. 1973). In promulgating guides the FTC may not adopt arbitrary or inconsistent regulatory approaches. Marco Sales Co. v. FTC, 453 F.2d 1 (2d Cir. 1971); ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 76 nn.1&2 (Supp. 1968-71).

[176]15 U.S.C. § 13(c) (1970).

[177]In pertinent part, section 2(c) provides that: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept . . . ."

[178]*Id.*

[179]363 U.S. 166 (1960).

[180]*See, e.g.*, El Salto, S.A. v. PSG Co., 444 F.2d 477, 480-81 (9th Cir.), *cert. denied*, 404 U.S. 854 (1971); FTC v. Washington Fish & Oyster Co., 282 F.2d 595 (9th Cir. 1960); Venus Foods, Inc. 57 F.T.C. 1025 (1960).

[181]*See, e.g.*, Empire Rayon Yarn Co. v. American Viscose Corp., 354 F.2d 182 (2d Cir. 1965), *vacated en banc*, 364 F.2d 491 (2d Cir. 1966); Thomasville Chair Co. v. FTC, 306 F.2d 541, 545 (5th Cir. 1962); Hruby Distrib. Co., 61 F.T.C. 1437 (1962); *cf.* Donovan, Inc. v. Lum's, Inc., 1972 Trade Cas. ¶ 74,083 (N.D. Ill. 1972).

[182]For general discussion of brokerage problems, see ABA, ANTITRUST DEVELOPMENTS, *supra* note 2, at 144-47; C. AUSTIN, *supra* note 9, ch. V;

How can a buyer protect himself? There is no absolute assurance that a vigorous and hard bargaining purchasing manager will not step over the line into a section 2(f), or section 2(c), or section 5 violation, but there is some advice that will reduce the likelihood of these unpleasant prospects. Under no circumstances should a purchaser lie about or misrepresent prices, terms, or allowances available elsewhere. To be absolutely safe, it might be better not to discuss competitive bids or prices at all other than in very general and truthful terms, such as telling a salesman that his prices are "too high." On the other hand, if the seller is clearly operating under some kind of misconception, withholding information on other bids appears to be an ill-advised tactic particularly if the FTC prevails in the *A & P* case.[183] If a seller proposes a deal that seems to be too good to be true—the proverbial offer that cannot be refused—a purchaser should be certain that the seller can demonstrate with hard facts why he is able to sell so low, that he absolutely must unload the merchandise, or, in the case of promotional allowances or services, that they are available to other customers on proportionally equal terms. Clean bill of health statements may be helpful, but the *Colonial Stores* warning should be heeded.[184]

Another possible aid to buyers would be to include a "most favored customer" clause as part of a form contract or purchase order. This would assure the best possible deal for the purchaser while insulating the seller from possible section 2(a) liability if lower prices are subsequently offered to competitors. Perhaps the operating words should be "honestly" and "forthrightness." If these standards are not met, section 2(f) or section 5 liability is distinctly possible. In other words, as far as the Robinson-Patman Act is concerned, the word might well be "Caveat Emptor."

D. BAUM, *supra* note 2, at 25, 29, 38-49; C. EDWARDS, *supra* note 29, ch. 5; 1955 REPORT, *supra* note 2, at 187-89, 190-93; F. ROWE, *supra* note 5, ch. 12; 16D J. VON KALINOWSKI ch. 33.

[183] *See* text accompanying notes 64-71 *supra*.

[184] *See* text accompanying notes 166-70 *supra*. Care must be exercised in verifying price data to avoid running afoul of the price fixing prohibitions of section 1 of the Sherman Act. United States v. Container Corp. of America, 393 U.S. 333 (1969). The *Container* case was distinguished in Wall Prods. Co. v. National Gypsum Co., 326 F. Supp. 295 (N.D. Cal. 1971), in which the price communications were made to comply with the meeting competition defense.

NOTES

PREMISES LIABILITY: A CRITICAL SURVEY OF INDIANA LAW

> It is surprising how much may sometimes be discovered by reading the cases. When, in the development of a rule over the course of a century, the courts have assigned a particular reason for it, it need not be concluded that the reason for it is the only one, or that it is the right one; but surely it is entitled to respectful consideration, and to some attempt to discover what it means, and what may lie behind it.[1]

I. INTRODUCTION

Duty has been said to be an "expression of the sum total of those policy considerations which leads the law to say that a particular plaintiff is entitled to protection."[2] The development of the law of negligence during the nineteenth century marked the inception of a judicial policy towards requiring all citizens to behave as reasonable and prudent men.[3] At the same time, however, the social desirability of permitting the possessor[4] to use his land

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[1]Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 611 (1942).

[2]W. PROSSER, LAW OF TORTS § 54, at 325-26 (4th ed. 1971) [hereinafter cited as PROSSER].

[3]In Heaven v. Pender, 11 Q.B.D. 503 (1883), the court first enunciated this policy when it stated:

> [W]henever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

Id. at 509.

[4]RESTATEMENT (SECOND) OF TORTS § 328E (1965) states:

> A possessor of land is
>
> (a) a person who is in occupation of the land with intent to control it, or

as he saw fit remained deeply rooted in English and American jurisprudence. In balancing these interests, common law judges developed certain rules of law which made the concept of negligence more compatible with the traditional notion that "the owner was sovereign within his own boundaries and . . . might do what he pleased on or with his own domain."[5] By classifying entrants as invitees, licensees, and trespassers and ascribing a gradient duty of care according to status, courts exempted the landowner from the obligation of a single duty of care to all persons under all circumstances. The province of the jury was thus circumscribed, and the scope of the possessor's duty was based entirely upon the category in which the entrant belonged. The effect of the classification system is the retention of greater power in the hands of judges to protect the interest of land ownership than would have been possible under the law of negligence.[6] A substantial proportion of cases are disposed of by directed verdicts and summary judgments without reference to the reasonableness of the defendants' conduct.[7] Premises liability remains today the largest area of the

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(b) a person who has been in occupation of the land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

[5]F. BOHLEN, STUDIES IN THE LAW OF TORTS 163 (1926).

[6]

Even if the judges had been mentally prepared to assess the liability of the landowner towards visitors simply by reference to the conduct of the reasonable man, they would not have been willing to leave the landowner to the verdict of a jury belonging, as a general rule, to the class of potential visitors to property rather than to that of landowners.

Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. REV. 182, 185 (1953).

Dean Green has described the functions of the judge and jury in negligence cases as follows:

> The judge passes his judgment on so-called questions of law—rights and duties; the jury on the so-called questions of fact—negligence, damage and causal relation. The judge is the dominant factor in this arrangement. He not only passes judgment first, but determines in what cases a jury can properly pass judgment at all . . . .

Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1023 (1928).

[7]In abrogating the common law rules, courts have expressed concern that the use of summary judgments, nonsuits, and directed verdicts had been excessive. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir.

law in which the concept of duty operates as a limitation upon negligence liability.[8]

The policy reasons behind protecting the interest of land ownership with minimal regard for the interest of human safety have lost their persuasive force. Contemporary societal values no longer reflect a reluctance to protect personal rights at the expense of property rights.[9] Reasonable people do not vary their conduct solely on the basis of whether an entrant is an invitee, a licensee, or a trespasser.[10] The general availability of liability insurance at inexpensive rates presents a legitimate but seldom mentioned policy consideration.[11] There is a trend in Indiana law towards a fuller application of the standard of reasonable care under the circumstances in other areas of tort liability. Technical status classifications that have in the past insulated certain entities from the duty of due care have been eliminated in the areas of governmental immunity,[12] interspousal immunity,[13] and products liability.[14]

The trend towards broader negligence liability has not left unscathed the possessor's special privilege to be careless. The tendency of the law today is to impose upon the possessor, like other members of society, a duty to use reasonable care to avoid

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1972); Rowland v. Christian, 69 Cal. 2d 108, 111, 443 P.2d 561, 563, 70 Cal. Rptr. 97, 99 (1968).

[8]PROSSER § 57, at 351.

[9]"[A] man's life or limb does not become less worthy of protection by the law . . . because he has come upon the land of another without permission or with permission but without a business purpose." Rowland v. Christian, 69 Cal. 2d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968).

[10]*Id.*

[11]Dean Prosser concludes that the availability of liability insurance serves as a valid additional reason for abrogating obsolete rules long under attack because of their own inherent weakness and lack of logic or policy. *See* PROSSER § 83, at 535. *See also* Comment, *Liability of a Land Occupier to Persons Injured on His Premises: A Survey and Criticism of Kansas Law*, 18 U. KAN. L. REV. 161, 162 (1969).

[12]Campbell v. State, 284 N.E.2d 733 (Ind. 1972) (tort immunity of state abolished with reservations); Perkins v. State, 252 Ind. 549, 251 N.E.2d 30 (1969) (tort immunity of state abolished as to proprietary functions).

[13]Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972) (doctrine of interspousal immunity abrogated in Indiana).

[14]J.I. Case Co. v. Sandefur, 245 Ind. 213, 197 N.E.2d 519 (1964) (privity requirement for negligence actions stricken). *See also* Note, *Products Liability in Indiana: Can the Bystander Recover?*, 7 IND. L. REV. 403 (1973).

injury to others.[15] In the landmark case of *Rowland v. Christian*,[16] the California Supreme Court abrogated the common law classification system and now requires that the possessor exercise reasonable care toward any entrant. Under the *Rowland* approach, the status of the entrant is but one factor to be considered in determining liability. Several jurisdictions have followed *Rowland*,[17] and others have abolished the licensee—invitee distinction by statute[18] or judicial decision.[19] In England, a common duty of care was imposed by statute upon possessors of land toward all visitors, whether licensees or invitees.[20] The United States Supreme Court has termed the common law system a "semantic morass" and has refused to extend its application to the law of admirality.[21] In Indiana, however, the transition toward holding the possessor to a single duty of care under all circumstances has been a piecemeal process. As courts have perceived the harshness of the present system, they have carved out exceptions to the general rules and have misapplied existing standards to reach a desired result.

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[15]The United States Supreme Court has suggested that the common law is moving toward the imposition of "a single duty of reasonable care in all circumstances." Kermarec v. Compagnie Generale, 358 U.S. 625, 630-31 (1959). *See also* Simmel v. New Jersey Co-op. Co., 47 N.J. Super. 509, 136 A.2d 301 (1957), *rev'd on other grounds*, 28 N.J. 1, 143 A.2d 521 (1958).

[16]69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). The *Rowland* approach has received considerable praise from the commentators. *See, e.g.*, Comment, Rowland v. Christian *and Washington Land Occupiers Liability*, 5 GONZAGA L. REV. 235 (1970); Comment, *A Re-Examination of the Land Possessor's Duty to Trespassers, Licensees, and Invitees*, 14 S.D.L. REV. 332 (1969); Comment, *Liability of a Land Occupier to Persons Injured On His Premises: A Survey and Criticism of Kansas Law*, 18 U. KAN. L. REV. 161 (1969); Comment, Smith v. Arbaugh's Restaurant, Inc., *and the Invitee-Licensee-Trespasser Distinction*, 121 U. PA. L. REV. 378 (1972); 44 N.Y.U. L. REV. 426 (1969); 41 TENN. L. REV. 190 (1973); 25 VAND. L. REV. 623 (1972).

[17]*See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972); Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971); Pickard v. City of Honolulu, 452 P.2d 445 (Hawaii 1969). *See also* Roseneau v. City of Estherville, 199 N.W.2d 125 (Iowa 1972).

[18]*See* CONN. GEN. STAT. REV. § 52-577a (Supp. 1974).

[19]*See* Alexander v. General Accident Fire & Life Assurance Corp., 98 So. 2d 730 (La. App. 1957); Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972). *See also* 25 VAND. L. REV. 623, 629 (1972).

[20]Occupiers' Liability Act, 5 & 6 Eliz. 2, c. 31 (1957).

[21]Kermarec v. Compagnie Generale, 358 U.S. 625, 631 (1959).

Rather than assuring consistency and stability in the law, the common law system has bred confusion and complexity.

The purpose of this Note is to survey the law of premises liability in Indiana in an effort to demonstrate that adherence to the common law classification system no longer serves a rational purpose. The results attained by misapplying the common law rules and establishing exceptions thereto approximate the results that would be attained by applying a standard of reasonable care under the circumstances. The law of negligence has permeated the area of premises liability to such an extent that a more rational process is needed to facilitate judicial expression of policy changes which have occurred in Indiana law since the common law system was adopted.

II. Trespassers

A. The Wilful-Wanton Rule

A trespasser is an unwelcome intruder upon the property of another.[22] He enters without right, express or implied consent, or express or implied invitation. The status of trespasser is the lowest on the legal scale of the common law classification system. The general rule as stated by Indiana courts is that the only duty owed to a trespasser by the possessor is to refrain from wilful, wanton, or intentional injury.[23] The trespasser assumes all risks incident to his presence and is required to take precautions for his own safety. Accordingly, the possessor is under no duty to anticipate the presence of trespassers, to maintain a lookout for them, to guard against their intrusion, or to keep his property in such a safe condition as to not endanger them.[24]

It has been said that a function of the common law is to develop rules which constitute the "most desirable and practicable

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[22]*See, e.g.*, Chicago, S.S. & S.B.R.R. v. Sagala, 140 Ind. App. 650, 221 N.E.2d 371 (1966). *See also* Restatement (Second) of Torts § 329 (1965).

[23]*E.g.*, Calvert v. New York Cent. R.R., 210 Ind. 32, 199 N.E.2d 239 (1936) (conduct of the possessor); Lingenfelter v. Baltimore & O.S.W. Ry., 154 Ind. 49, 55 N.E. 1021 (1900) (condition of premises). It is often stated that the only duty owed by the possessor is to refrain from wilful or intentional injury. *See, e.g.*, Chicago, S.S. & S.B.R.R., 140 Ind. App. 650, 221 N.E.2d 371 (1966); Standard Oil Co. v Scoville, 132 Ind App. 521, 175 N.E.2d 711 (1961). However, a reckless disregard of the consequences may be so great as to imply a willingness to injure and entitle a trespasser to recover. Palmer v. Chicago, St. L. & P.R.R., 112 Ind. 250, 14 N.E. 70 (1887).

[24]Neal v. Home Builders, Inc., 232 Ind. 160, 111 N.E.2d 280 (1953).

compromise from a social standpoint between conflicting interests, and to modify these from time to time to meet changing social conditions and needs . . . ."[25] Such an endeavor necessarily involves judicial reexamination of the rationales behind the common law rules in light of changing social conditions. Unfortunately, few Indiana courts have supplemented their verbal allegience to the wilful-wanton rule with an effort to justify its application.[26] The commentators, in criticizing the rule, have offered several possible justifications for the disjunction between the law of premises liability, which emphasizes status, and the law of negligence, which emphasizes reasonableness.[27] Most agree that the difference exists because the rules pertaining to premises liability predate the development of negligence theory.[28] On this basis, the wilful-wanton rule can no longer be said to be a legitimate compromise between the competing social interests of land ownership and human life. It is but an historical remnant of a society deeply rooted in the concept of land ownership. In modern society, at least three reasons can be offered for replacing the wilful-wanton rule with the general rules of negligence.

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[25]Eldredge, *Tort Liability to Trespassers*, 12 TEMPLE L.Q. 32 (1937).

[26]The limited duty accorded the possessor cannot be based upon the premise that the law does not require him to anticipate the presence of others since the wilful-wanton rule has been applied with equal vigor to licensees. *See* Cannon v. Cleveland, C.C. & St. L. Ry., 157 Ind. 682, 62 N.E. 8 (1901). The presence of a licensee is always to be expected. F. BOHLEN, STUDIES IN THE LAW OF TORTS 61 (1926). Dicta in older cases suggest that the trespasser is a wrongdoer unworthy of being treated with reasonable care. *See* Brooks v. Pittsburgh, C.C. & St. L. Ry., 158 Ind. 62, 68, 62 N.E. 694, 696 (1904) (a trespasser can assert but a wrongdoer's right). This rationale is based upon the notion of wrongdoing of a society in which the trespasser was an outlaw or poacher whose entry was both unanticipated and resented. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972).

[27]Professor James systematically refutes the following justifications for the limited duty of care owed to trespassers by possessors: (1) people are not likely to trespass, so the possessor may disregard their possible presence, (2) the duty of due care would impose an unreasonable burden on land use, (3) the trespasser is a wrongdoer whose presence amounts to contributory negligence, and (4) the trespasser assumes all risks incident to his presence. *See* James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 145, 150-53 (1953). *See also* PROSSER § 58, at 366-68; Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108 (1961); 25 VAND. L. REV. 623, 625 (1972).

[28]*See, e.g.*, Hughes, *Duties To Trespassers*, 68 YALE L.J. 633, 694 (1959); Marsh, *supra* note 6, at 184.

First, the wilful-wanton rule is harsh[29] and inflexible.[30] Its application substitutes the standard of care of a society in which the trespasser was an "outlaw or poacher whose entry was both unanticipated and resented . . ."[31] for modern community standards of care. The jury, the final arbiter of community standards in our system of jurisprudence, must restrict its inquiry to questions of status rather than questions of reasonableness.[32] As a result, the possessor is not required by law to act reasonably toward trespassers, a proposition quite inconsistent with the values of a civilized society. Secondly, the liability of a possessor to an injured trespasser could be harmoniously and beneficially absorbed into negligence theory with minimal adverse effect upon the interest of land ownership.[33] In numerous cases in which the wilful-wanton rule has been applied, the same result of nonliability could have been reached had the court applied the general rule of reasonable care under the circumstances. When the trespasser is contributorily negligent,[34] or when his presence is unknown and could not reasonably have been anticipated,[35] it is unlikely that recovery

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[29]*See* Neal v. Home Builders, Inc., 232 Ind. 160, 111 N.E.2d 280 (1953). In *Neal*, a young mother was killed while attempting to rescue her three year old child who was trapped inside a semicompleted dwelling house. Recovery was denied, although the house was unattended and unsecured and children were known to play therein. *Compare* Wilinski v. Belmont Builders, Inc., 143 N.E.2d 69 (Ill. Ct. App. 1957).

[30]Perhaps the most extreme reflection upon the rigidity of the common law classification system is Lord Dunedin's statement in Robert Addie & Sons v. Dumbreck, [1929] A.C. 358: "Now the line that separates each of these three classes [invitees, licensees and trespassers] is an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories." *Id.* at 371. *See* PROSSER § 58, at 357 n.63.

[31]Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 102-03 (D.C. Cir. 1972).

[32]*See id.* at 104. When the evidence concerning the status of the entrant is conflicting or inconclusive, status is a question of fact for the jury. Silvestro v. Walz, 222 Ind. 163, 51 N.E.2d 629 (1943).

[33]*See* Hughes, *Duties to Trespassers*, 68 YALE L.J. 633, 634 (1959).

[34]*See, e.g.*, Krenzer v. Pittsburgh, C.C. & St. L. Ry., 151 Ind. 587, 52 N.E. 220 (1898) (person sleeping on a railroad track); Dull v. Cleveland, C.C. & St. L. Ry., 21 Ind. App. 571, 52 N.E. 1013 (1899) (person standing on track without taking precautions as train approached). Assumption of risk has also been invoked to deny recovery, especially when the entrant has proceeded across premises in the dark. *See, e.g.*, Lingenfelter v. Baltimore O.S.W. Ry., 154 Ind. 49, 55 N.E. 1021 (1900).

[35]*See, e.g.*, Jordon v. Grand Rapids & I. Ry., 162 Ind. 464, 70 N.E. 524 (1904).

would be permitted under any standard of care short of strict liability. Thirdly, the cases reflect a judicial disenchantment with the privilege to be careless which the strictly applied wilful-wanton rule confers upon the possessor. The harsh and often unjust results of applying the wilful-wanton rule have engendered exceptions for child trespassers,[36] dangerous conditions,[37] and dangerous activities.[38] Moreover, the misdefinition of the terms "wilful" and "wanton,"[39] and the elevation of a trespasser to the status of an invitee[40] have emerged as judicial techniques which mitigate the harsh operation of the wilful-wanton rule. Although such exceptions and techniques enable courts to move closer to the issues worthy of scrutiny in a given case, their artificiality and complexity are unfortunate. The Indiana judicial process should not be burdened with the confusion which stems from the adherence to a rule which, in fact, often results in misrepresentations of the true basis of a court's decision.

B. Judicial Modification of the Wilful-Wanton Rule

Indiana courts have not been hesitant to strictly apply the wilful-wanton rule to situations in which the presence of trespassers was unknown and unforeseeable.[41] Under these circumstances, there is no reason to depart from the rule since the same result of nonliability is reached whether it be said that the possessor was not guilty of wilful and wanton misconduct or that he exercised reasonable care under the circumstances.[42] Under either standard it would be manifestly unjust to require a possessor to conduct his activities or make his premises safe on the basis of a remote likelihood that someone might intrude thereon and be

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[36]*See, e.g.*, Pier v. Shultz, 243 Ind. 200, 182 N.E.2d 255 (1962).

[37]*See, e.g.*, Harris v. Indiana Gen. Serv. Co., 206 Ind. 351, 189 N.E. 410 (1934).

[38]*See, e.g.*, Indiana Harbor Belt R.R. v. Jones, 220 Ind. 139, 41 N.E.2d 361 (1942).

[39]*See, e.g.*, Cannon v. Cleveland, C.C. & St. L. Ry., 157 Ind. 682, 62 N.E. 8 (1901).

[40]*See, e.g.*, New York, C. & St. L. Ry. v. Mushrush, 11 Ind. App. 192, 37 N.E. 954 (1894).

[41]*See, e.g.*, Jordon v. Grand Rapids & I. Ry., 162 Ind. 464, 70 N.E. 524 (1904) (railroad company not required to anticipate the presence of a child sitting on top of freight car on a sidetrack). This type of case is easily disposed of with a status determination followed by the assertion that the possessor owed no duty to the trespasser.

[42]*See* Peaslee, *Duty to Seen Trespassers*, 27 HARV. L. REV. 403 (1914).

injured. However, when a possessor does not take due precautions for the safety of trespassers he knows are present or are likely to be present upon his premises, his conduct moves into the realm of unreasonableness. At this point, the courts have retreated from a strict application of the wilful-wanton rule and have moved toward the standard of reasonable care under the circumstances.

Under a strict interpretation of the wilful-wanton rule, the possessor may assume, as a matter of law, that trespassers are not present or likely to be present upon his premises.[43] This is a reasonable assumption, however, only to the extent it is in accord with the facts of the case at hand. If the facts are such that the possessor knows that the likelihood of intrusion is high, the assumption is based upon a premise of nonexistent fact. Thus, a number of jurisdictions have imposed a duty of care upon the possessor when the burden of anticipation is slight when compared with the probability of harm.[44] Often termed the "frequent trespassers upon a limited area" exception to the wilful-wanton rule, it invokes the negligence formula when the possessor is aware that a substantial number of persons are in the habit of intruding upon his premises at a particular point.[45] In regard to such persons, the possessor is under a duty of reasonable care to discover their presence and to conduct his activities with regard for their safety. In Indiana, the wilful-wanton rule is generally invoked to deny the existence of a duty of due care and the possessor is not required to anticipate the presence of trespassers. Before such a duty will be found to exist, the circumstances must be such that an invitation can be implied.[46] In a few cases, however, the invitation fiction has been attenuated to encompass situations in which the possessor's conduct could hardly be said to constitute "inducement" to enter. For example, persons crossing railroad tracks have been held to be invitees of a railroad company,[47] while common sense

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[43]*E.g.*, Cannon v. Cleveland, C.C. & St. L. Ry., 157 Ind. 682, 62 N.E. 8 (1901).

[44]PROSSER § 58, at 360-61. Prosser states that most courts have adopted this rule.

[45]*Id.*

[46]*See, e.g.*, Chicago & E.I.R.R. v. Hedges, 105 Ind. 398, 7 N.E. 801 (1885) (persons crossing tracks to approach depot held to be licensees by invitation). *But see* Pittsburgh, C.C. & St. L. Ry. v. Philpot, 75 Ind. App. 59, 127 N.E. 827 (1920) (accident in switchyard).

[47]*See* New York, C. & St. L. Ry. v. Mushrush, 11 Ind. App. 192, 37 N.E. 954 (1894) (railroad company derived economic benefit from persons crossing track at a particular point since it was spared the expense of building a public crossing).

dictates that their presence is both unwelcome and costly to the company.[48] Invoking the creative power of the courts to elevate the status of a trespasser to that of an invitee is a cumbersome means for reaching reasonable results. It is a means which is made necessary by continued adherence to the wilful-wanton rule. The better reasoned Indiana cases have imposed a duty of anticipation simply on the basis of probable presence upon premises where a dangerous activity is being carried on[49] or where a highly dangerous condition exists.[50]

A more significant erosion of the wilful-wanton rule in Indiana occurs when the presence of a trespasser is clearly known by the possessor. In this situation, courts frequently misdefine the terms "wilful" and "wanton" to deny the substance of the rule. Strictly applied, the terms "wilful" and "wanton" are used to characterize a state of mind indicating a conscious and reckless indifference to the consequences of one's act.[51] If the possessor were indeed exempt from the standard of reasonable care, he would not be held liable for injuring a trespasser unless his conduct transcended negligence.[52] However, in *Cannon v. Cleveland, Chicago & St. Louis Railway*,[53] a case in which recovery was denied

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[48]"Railroad companies are not eleemosynary institutions interested in shortening the weary stranger's number of steps home by throwing their private property open as a short-cut." Eldredge, *Tort Liability to Trespassers*, 12 TEMPLE L.Q. 32, 36 (1937).

[49]*See* Indiana Harbor Belt R.R. v. Jones, 220 Ind. 139, 41 N.E.2d 361 (1942); Cleveland, C.C. & St. L. Ry. v. Means, 59 Ind. App. 383, 104 N.E. 785 (1915).

[50]*See* Harris v. Indiana Gen. Serv. Co., 206 Ind. 351, 189 N.E. 410 (1934).

[51]Wyant v. Lobdell, 277 N.E.2d 595 (Ind. Ct. App. 1972) (words "wilful" and "wanton" relate to the state of the actor's mind rather than to the nature of his act); Bybee v. Brooks, 123 Ind. App. 129, 106 N.E.2d 693 (1952) (reckless indifference to consequences under circumstances which show actor has knowledge of situation and that injury is probable to result).

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> Wilfullness and negligence are diametrically opposite to each other. One imports inattention, inadvertence and indifference, while the other imports intention, purpose and design. There can be no negligence with intent, and no wilfullness without intent.

Barrett v. Cleveland, C.C. & St. L. Ry., 48 Ind. App. 668, 671, 96 N.E. 490, 492 (1911). Under code pleading, wilfulness and negligence could not be pleaded in the same paragraph. Kizer v. Hazelett, 221 Ind. 575, 49 N.E.2d 543 (1943).

[53]157 Ind. 682, 62 N.E. 8 (1901).

because the presence of a trespasser was unknown to the possessor, the court stated that the only duty owed to trespassers and bare licensees is "not to injure them wilfully or wantonly, but to use reasonable care to avoid injury after their danger is discovered."[54] As a practical matter, this is simply another way of stating that the possessor is bound by a duty to conduct his activities with reasonable care under the circumstances.[55] The results of cases involving known trespassers have generally been consistent with the results that would have been reached had the general rules of negligence been forthrightly applied. The possessor may reasonably assume that once cognizant of the danger, the trespasser will take precautions for his own safety.[56] Accordingly, the duty of care imposed upon the possessor will generally be fulfilled by a warning.[57] If the trespasser is a child[58] or a helpless adult,[59] the possessor cannot reasonably assume that he will remove himself from his position of peril. In this situation, and in situations in which it is clear that the warning has not been heard,[60] the possessor must use every means at hand to prevent injury.[61]

The duty of due care arising from the possessor's knowledge of a trespasser's presence is generally justified on the basis of the "last clear chance" doctrine.[62] Since the doctrine applies only

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[54]*Id.* at 689, 62 N.E. at 11, *quoting* 3 B. ELLIOTT & W. ELLIOTT, LAW OF RAILROADS § 1250, at 589 (2d ed. 1907). *See also* Parker v. Pennsylvania Co., 134 Ind. 673, 34 N.E. 504 (1893).

[55]For an excellent discussion of how the duty owed to known trespassers approximates a duty of reasonable care under the circumstances, see Peaslee, *Duty to Seen Trespassers*, 27 HARV. L. REV. 403 (1914).

[56]*E.g.*, Ullrich v. Cleveland, C.C. & St. L. Ry., 151 Ind. 358, 51 N.E. 95 (1898); Palmer v. Chicago, St. L. & P.R.R., 112 Ind. 250, 14 N.E. 70 (1887).

[57]*See, e.g.*, Pittsburgh, C.C. & St. L. Ry. v. Judd, 10 Ind. App. 213, 36 N.E. 775 (1894).

[58]Indianapolis, P. & C.R.R. v. Pitzer, 109 Ind. 179, 6 N.E. 310 (1886). However, if it is shown that the child was actually aware of the danger, the actor is entitled to assume that the child will exercise care for his own safety. Chicago, S.S. & S.B.R.R. v. Sagala, 140 Ind. App. 650, 221 N.E.2d 371 (1966).

[59]*E.g.*, New York, C. & St. L. Ry. v. Ault, 56 Ind. App. 293, 102 N.E. 998 (1913) (railroad company moved train without taking reasonable precautions for the safety of trespasser pinned under engine).

[60]*E.g.*, Lake Erie & W.R.R. v. Brafford, 15 Ind. App. 655, 43 N.E. 882 (1896) (engineer made no effort to stop until train was within forty feet of deaf mute who could not hear warning).

[61]New York Cent. R.R. v. Green, 105 Ind. App. 488, 15 N.E.2d 748 (1938).

[62]The elements of the last clear chance doctrine are: (1) plaintiff must be in a position of peril, (2) defendant must have actual knowledge of plain-

in situations in which the possessor is engaged in an activity[63] and has the last opportunity to avoid injury, it can not be used to depart from the wilful-wanton rule when a trespasser is injured due to a static condition of the premises. For a number of reasons, courts find the wilful-wanton rule more palatable when a trespasser is injured by a static condition of the land, and have been reluctant to depart from its strict application. Here, as in many other areas, courts traditionally have been more willing to control conduct rather than compel it.[64] Moreover, trespassers should generally realize that the land has not been made safe for their unwelcome intrusions,[65] and in requiring the trespasser to look out for himself, Indiana courts have placed significant emphasis on the likelihood that trespassers will observe and avoid dangerous conditions on the premises.[66] For these reasons, and perhaps because courts fear the imposition of unreasonable burdens upon the possessor,[67]

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tiff's peril, (3) defendant must have opportunity later than plaintiff to avoid injury, and (4) plaintiff must make all possible effort to extricate himself from his position of peril. Bayne v. Turner, 142 Ind. App. 580, 236 N.E.2d 503 (1968). The peril of plaintiff may be one of two types: by his own negligence or by his inadvertence to the surroundings, he has placed himself in a position of danger from which he is physically unable to extricate himself. Harper, *Development in the Law of Torts in Indiana 1940-1945*, 21 IND. L.J. 447, 460 (1946). Liability is imposed, notwithstanding plaintiff's contributory negligence, if the defendant could have avoided harming him in the exercise of reasonable care. L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942).

[63]Even if a case were to arise in which the possessor had the "last clear chance" to prevent a trespasser from being injured by a condition of the premises, such as by shouting a timely warning, recovery would be denied since Indiana law imposes no affirmative duty to aid one in peril. *See* L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942). In *Hicks*, the court stated that the duty to avoid aggravation of another's injury is similar to that imposed by the last clear chance doctrine, but the latter is a "negative" rather than an "affirmative" obligation and does not depend upon the relationship of the parties. *Id.* at 95-96, 40 N.E.2d at 338.

[64]*See* Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 316, 324-25 (1908).

[65]James, *supra* note 27, at 158.

[66]Note how the court in Plotzki v. Standard Oil Co., 228 Ind. 518, 92 N.E.2d 632 (1950), emphasized the likelihood that trespassing children would observe dangerous conditions.

[67]In Neal v. Home Builders, Inc., 232 Ind. 160, 111 N.E.2d 280 (1953), the court showed open hostility to an enlargement of the possessor's scope of liability on the basis of unreasonableness:

> Restrictions upon the use of property diminishes [sic] pro tanto the beneficial character of the use, and hence the law imposes restric-

a trespasser injured by a natural condition of the land stands little chance of recovery in Indiana.[68] This fear, however, is unfounded, since the standard of reasonable care only requires reasonable precautions in light of foreseeable risks of harm. It would seem that in most instances, the burden of altering land in its natural state would be sufficiently heavy to preclude recovery under negligence theory, particularly when the likelihood of trespass was not great.

However, when an artificial condition of the land presents a high danger of very great harm to intruders, Indiana courts have again retreated from the strict application of the wilful-wanton rule. If the possessor knew of a dangerous condition upon his premises, and he reasonably could have anticipated that intruders would be likely to come in contact with it, and that such contact would be reasonably sure to inflict serious injury, a duty of due care will be imposed upon him.[69] Accordingly, he is required to guard the dangerous condition, give timely warning of it, and take whatever additional steps are reasonably necessary to protect persons likely to be injured by it.[70] The "dangerous condition" rule has been sparingly applied in Indiana. Since an intruder generally would be contributorily negligent in encountering an obviously dangerous condition, it has been suggested that the danger must be concealed or unexpected.[71] At least when children are involved, "concealed" has been interpreted to mean not likely to be appreciated. Thus, a fire[72] and a large dog[73] have been held to be conditions potentially dangerous to children within the mean-

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> tions as seldom as possible and never except upon the strongest grounds. The law which is reluctant to impose restraint upon an owner's use of his land even when causing damage beyond his boundary, is more unwilling to impose restraint upon a user which is dangerous only to those who intrude upon his land.

Id. at 185, 111 N.E.2d at 292, *quoting from* Holstine v. Director Gen. of R.R., 77 Ind. App. 582, 593, 134 N.E. 303, 307 (1922). *See* Hughes, *Duties to Trespassers*, 68 YALE L.J. 633, 646 (1959).

[68]*See* Harness v. Churchmembers Life Ins. Co., 241 Ind. 672, 175 N.E.2d 132 (1961).

[69]Harris v. Indiana Gen. Serv. Co., 206 Ind. 351, 189 N.E. 410 (1934).

[70]*Id.* at 359, 189 N.E. at 413.

[71]*See* James, *supra* note 27 at 156.

[72]Wozniczka v. McKean, 144 Ind. App. 471, 247 N.E.2d 215 (1969).

[73]Keane v. Schroeder, 148 Ind. App. 131, 264 N.E.2d 95 (1970).

ing of the rule, whereas a semiconstructed dwelling house[74] and a step ladder[75] have been held not to be. Dicta in some cases[76] suggest that the condition must be "inherently dangerous," although the original formulation of the rule did not contain such a limitation. Even with such a limitation, the dangerous condition rule is capable of typical common law growth.[77]

The significance in the application of the dangerous condition rule is that it allows the plaintiff to surmount the duty hurdle and recover from the possessor when the possessor has acted unreasonably. Recovery is not denied simply because the entrant bore the status of a trespasser. Under the negligence formula the interests of the landowner are adequately protected and the interest in human life receives its due consideration. The flexibility inherent in the dangerous condition rule was well demonstrated in *Echevarria v. United States Steel Corp.*[78] In *Echevarria,* an eight year-old boy chased a pigeon to a location deep within defendant's property until the bird flew atop an electrical transformer. In an attempt to capture the bird, he climbed to the roof of an adjacent building and descended to the transformer platform. Upon coming in contact with the transformer, he was shocked and fell to the ground. In affirming the trial court's judgment for the plaintiff on the basis of the dangerous condition rule, the Seventh Circuit Court of Appeals emphasized the fact that the defendant had left a ladder on the premises which made the top of the building easily accessible,[79] a factor which would have been precluded from consideration under the traditional classification system. Although the defendant's maintenance of the transformer had high social utility, the burden of removing the ladder and thus eliminating the danger to foreseeably trespassing children[80] was slight compared to the gravity of potential harm to human life.

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[74]Neal v. Home Builders, Inc., 232 Ind. 160, 111 N.E.2d 280 (1953).

[75]*Id.*

[76]*Id. See also* Wozniczka v. McKean, 144 Ind. App. 471, 247 N.E.2d 215 (1969).

[77]In MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), Judge Cardozo extended the "inherently dangerous articles" exception of the privity requirement to anything which would be dangerous if negligently made. The effect was to "swallow up" the general rule. *See* PROSSER § 96, at 642-43.

[78]392 F.2d 885 (7th Cir. 1968) (applying Indiana Law).

[79]*Id.* at 893.

[80]The premises were located near a park. *Id.* at 887.

The wilful-wanton rule is the remnant of a legal system which traced many of its standards to a heritage of feudalism. In modern society, the sanctity once attributed to land ownership no longer outweighs the interest in human safety. The application of the rule involves a cumbersome status determination that frequently makes it more difficult to decide into what category an intruder fits than it is to decide the case.[81] This determination pays little attention to the decisive issues in a negligence case—the foreseeability of presence, the risk of substantial injury, and the reasonableness of imposing a burden to take precautions. If a duty were recognized in all men to behave reasonably, these issues would be questions of fact for the jury. If tighter control of the jury were deemed necessary to protect the possessor's interest, the unforeseeability of a trespasser's presence could be made a rebuttable presumption within the framework of negligence theory.[82] It is not suggested that courts should ignore the status of the entrant as a trespasser. However, the character of the trespasser's entry should be no more than a relevant circumstance to be considered in determining whether the possessor had exercised reasonable care in light of all relevant circumstances.

C. Trespassing Children

The "attractive nuisance" doctrine has long been accepted in Indiana,[83] although the more precise version of the doctrine as formulated in the *Restatement of Torts*[84] has been rejected.[85] In

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[81]The line between the various classifications is often very difficult to draw. *See* Hollowell v. Greenfield, 142 Ind. App. 344, 216 N.E.2d 537 (1966).

[82]Professor James has suggested that this approach be taken. James, *supra* note 27, at 150.

[83]Binford v. Johnson, 82 Ind. 426 (1882). Earlier courts suggested that they might be receptive to a doctrine of this nature. *See* Young v. Harvey, 16 Ind. 314 (1861); Durham v. Musselman, 2 Blackf. 96 (Ind. 1827). The attractive nuisance doctrine was first set forth in Sioux City & P.R.R. v. Stout, 17 Wall. 657 (1873). Space does not allow proper consideration of the Indiana cases decided prior to 1962. For a discussion of these cases and the history of the attractive nuisance doctrine in Indiana, see Note, *The Attractive Nuisance Doctrine*, 32 IND. L.J. 75 (1956); Note, *Landowner's Liability for Infant Drowning in Artificial Pond*, 26 IND. L.J. 266 (1951); 8 IND. L.J. 508 (1933).

[84]RESTATEMENT (SECOND) OF TORTS § 339 (1965).

[85]Harness v. Churchmembers Life Ins. Co., 241 Ind. 672, 175 N.E.2d 132 (1961). Despite the urging of plaintiff's counsel, the court refused to adopt the doctrine as set forth in RESTATEMENT OF TORTS § 339 (1934). Justice Arterburn dissented.

Pier v. Schultz,[86] the Indiana Supreme Court set forth the elements necessary to a cause of action based upon the attractive nuisance doctrine. Although the *Pier* court's statement of the doctrine is cumbersome and confusing, it is the most recent Indiana authority on the doctrine and must be considered in its entirety. First, the structure or condition complained of must be particularly attractive to children and provide a special enticement for them to sport or play theron.[87] The *Pier* court's insistence that the element of allurement be present has arguably aligned Indiana with the small minority of jurisdictions which resort to a legal fiction to justify the theoretical basis of the doctrine. The allurement requirement originated with common law judges who agreed with the result achieved by the doctrine but found its theoretical basis unacceptable. In seeking a doctrinal rationale more palatable to their adherence to the common law classification system, they created a fiction. By implying an invitation from the alluring situation created by the possessor, the child trespasser was elevated to the status of invitee.[88] Thus, the duty hurdle was surmounted and negligence theory became relevant. The logical extension of this reasoning led to the rule in some jurisdictions that the trespassing child must have been injured by the condition which actually induced the trespass; if he discovered the condition after he became a trespasser, an invitation could not be implied.[89] The fallacy of this fictional basis

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[86]243 Ind. 200, 182 N.E.2d 255 (1962). For clarity of presentation, the elements of the doctrine will be discussed in a different sequence than set forth in the opinion. The actual holding of the *Pier* court was:

> The courts of this state have consistently held that in order for the doctrine of attractive nuisance to apply, the following facts must be made to appear: (1) The structure or condition complained of must be maintained or permitted upon the property by the owner or the occupant thereof. (2) It must be peculiarly dangerous to children and of such nature that they will not comprehend the danger. (3) It must be particularly attractive to children and provide a special enticement for children to play or sport thereon. (4) The owner must know, or the facts alleged must be such as to charge him with constructive knowledge, of the existence of such structure or condition, and that children do or are likely to trespass upon his property and be injured by such structure or condition. (5) The injury sustained must be the natural, probable and foreseeable result of the original wrong complained of.

Id. at 205, 182 N.E.2d at 258.

[87]*Id.* at 205, 182 N.E.2d at 258.

[88]*See* Green, *Landowners' Responsibility to Children*, 27 TEXAS L. REV. 1, 4-5 (1948).

[89]United Zinc & Chem. Co. v. Britt, 258 U.S. 268 (1922). *Britt* was apparently overruled by implication in Best v. District of Columbia, 291 U.S.

of duty is obvious, and accordingly is presently rejected in the great majority of jurisdictions.[90] Prior to *Pier*, support for it could be found mostly by dicta in cases in which recovery was seemingly denied on other grounds.[91] Indeed, had the *Pier* court accepted the doctrine in its original simplicity it could have found the element of allurement to be unnecessary.[92] Other Indiana courts which first recognized the doctrine experienced little difficulty in basing the resultant duty on the value of child life to the

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411 (1934). Later courts have held that *Britt* is no longer in effect. Eastburn v. Levin, 113 F.2d 176 (D.C. Cir. 1940); McGettigan v. National Bank, 320 F.2d 703 (D.C. Cir. 1963). *See* PROSSER § 59, at 365-66; Green, *supra* note 88, at 8-12.

[90]PROSSER § 59, at 366.

[91]In Indianapolis Water Co. v. Harold, 170 Ind. 170, 83 N.E. 993 (1908), a nine year-old boy drowned while attempting to cross a log footbridge over defendant's canal. In reversing a judgment for plaintiff because the evidence was insufficient to sustain the verdict, the court noted that the boy was not lured to the canal by the log. However, the true basis for the holding seems to have been that the boy heedlessly encountered an appreciated risk. *See id.* at 177, 83 N.E. at 995. In Indianapolis Motor Speedway Co. v. Shoup, 88 Ind. App. 572, 165 N.E. 246 (1929), the court recognized the allurement requirement in dictum, but held that the attractive nuisance doctrine had no application to the facts and circumstances of the case. *Id.* at 578, 165 N.E. at 248. In Holstine v. Director Gen. of R.R., 77 Ind. App. 582, 134 N.E. 303 (1922), a child was hit by a train while playing upon a pile of sawdust situated near the tracks. The court held the attractive nuisance doctrine inapplicable because the child was not injured by the sawdust. *Id.* at 591, 134 N.E. at 306. However, the true basis for nonliability seems to have been that the railroad had exercised reasonable care. The court held that a presumption exists that a child is under the supervision of an adult, and absent an allegation that the child was unattended and that the railroad was aware of this fact, a demurrer to a complaint based upon negligence would be properly sustained. *Id.* at 605-06, 134 N.E. at 311. It is significant that the *Holstine* court found the status of the child to be irrelevant since the action was brought by its parents. *Id.* at 598, 134 N.E. at 309.

Two early "turntable" cases, however, relied strongly upon the allurement fiction, and could be said to support such a requirement. *See* Lewis v. Cleveland, C.C. & St. L. Ry., 42 Ind. App. 337, 84 N.E. 23 (1908); Chicago & E.R.R. v. Fox, 38 Ind. App. 268, 70 N.E. 81 (1904). However, in Drew v. Lett, 95 Ind. App. 89, 182 N.E. 547 (1932), the court held that a child killed by poisonous gas while playing in a mine could recover on the basis of the attractive nuisance doctrine. This holding is contrary to United Zinc & Chem. Co. v. Britt, 285 U.S. 268 (1922), the leading authority for the old rule that the child must be injured by the condition which induced the trespass.

[92]*See* Green, *Landowners' Responsibility to Children*, 27 TEXAS L. REV. 1, 4-5 (1948).

community and the probability of harm to that interest.[93] It is readily understandable how common law judges, not yet fully appreciative of the implications of negligence theory, resorted to a fiction to justify the imposition of a duty of reasonable care. Today, however, the concept of negligence is basic in our legal system and the acceptance of such a fiction is without justification. The element of allurement is significant only to the extent that it bears upon the factual issue of whether the possessor reasonably could have anticipated the presence of children upon his premises.[94] This is more appropriately a negligence consideration and should not bear on the issue of whether a duty of care exists. It is submitted that *Pier* should be interpreted in this light.

Secondly, the structure or condition alleged to be an attractive nuisance must be maintained or permitted upon the property by the possessor.[95] The application of the doctrine is limited to artificial conditions. It does not apply to natural conditions[96] or conditions which merely duplicate those commonly found in nature.[97] The reason generally advanced by Indiana courts for imposing this limitation upon the doctrine is that if parents fail to supervise or warn their children of natural dangers, they should not expect a stranger to do so.[98] This rationale ignores the possibility that a trespassing child may have disobeyed his parents instructions or escaped their vigilance.[99] To hold the parents contributorily negligent as a matter of law runs contrary to the policy considerations which give rise to the doctrine. It seems that if the child

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[93]*See, e.g.*, Cincinnati & Hammond Spring Co. v. Brown, 32 Ind. App. 58, 69 N.E. 197 (1903).

[94]*See* James, *supra* note 27, at 164.

[95]243 Ind. at 205, 182 N.E.2d at 258.

[96]Harness v. Churchmembers Life Ins. Co., 241 Ind. 672, 175 N.E.2d 132 (1961).

[97]Plotzki v. Standard Oil Co., 228 Ind. 518, 92 N.E.2d 632 (1950) (water). *See also* Evansville v. Blue, 212 Ind. 130, 8 N.E.2d 224 (1937) (water); Lockridge v. Standard Oil Co., 124 Ind. App. 257, 114 N.E.2d 807 (1953); Anderson v. Reith-Riley Constr. Co., 112 Ind. App. 170, 44 N.E.2d 184 (1942) (soil).

[98]*See, e.g.*, Lockridge v. Standard Oil Co., 124 Ind. App. 257, 114 N.E.2d 807 (1953).

[99]In Indiana Harbor Belt R.R. v. Jones, 220 Ind. 139, 41 N.E.2d 361 (1942), the court refused to hold the mother of an eight year-old boy contributorily negligent as a matter of law because the child played in a railroad yard. The court noted that children may escape the due diligence of their parents. This seems to be a realistic approach.

is to be protected at all, he should be protected by the person who can do so with the least inconvenience. If the law does not expect a child to appreciate the dangers of playing in a freight yard[100] or playing with fire,[101] it can hardly expect him to appreciate the danger of water. Even if the doctrine were extended to apply to natural conditions under the general negligence formula, the interest of the landowner would be adequately protected. The burden of improving land in its natural state would be sufficiently heavy in many instances to preclude the imposition of more than a cursory duty of care.[102] Only when the possessor could have readily and inexpensively eliminated the danger would recovery be permitted.[103]

The third element that the *Pier* court held to be necessary to a cause of action based upon the attractive nuisance doctrine is that the structure or condition must be peculiarly dangerous to children and of such a nature that they will not comprehend the danger.[104] By first insisting that the structure or condition be peculiarly dangerous, the court seems to have recognized that a child with meddling propensities can injure himself upon virtually any object. Accordingly, the emphasis is placed upon objects which create an unreasonable risk of harm. By further requiring that the structure or condition be of a such a nature that a child will not comprehend its danger, the court has adopted the basic negligence concept that one owes a duty to himself to avoid appreciated dangers.[105] One of the basic reasons for distinguishing between the duties owed to an adult and a child trespasser is a

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[100]*Id.*

[101]Wozniczka v. McKean, 144 Ind. App. 471, 247 N.E.2d 215 (1969).

[102]*See* James, *supra* note 27, at 151.

[103]Justice Arterburn supported this view in his dissenting opinion in Harness v. Churchmembers Life Ins. Co., 241 Ind. 672, 175 N.E.2d 132 (1961):

> The doctrine does not make a landowner an insurer of trespassing children . . . . With that thought in mind, the law looks at the measure of care required and the relatively inexpensive measures which may be used to avoid the risk of danger to children.

Id. at 681, 175 N.E.2d at 136.

[104]243 Ind. at 205, 182 N.E.2d at 258.

[105]*See* Indianapolis Water Co. v. Harold, 170 Ind. 170, 83 N.E. 993 (1908), in which recovery was denied because an infant trespasser actually recognized the danger of drowning. *See also* Note, *Landowner's Liability for Infant Drowning in Artificial Pond*, 26 IND. L.J. 266, 271 (1951). In assessing whether the child reasonably could have been expected to appreciate the risk,

recognition of the child's inability to protect himself.[106] Therefore, the attractive nuisance doctrine does not apply to situations in which the condition involves dangers that are or should be obvious to children. The child's failure to make the responsible choice to avoid appreciated dangers bears little relation to whether a duty of care in the first instance ever existed. A duty is more logically imposed by an objective assessment of the possessor's conduct. Thus, the real inquiry should be whether the possessor reasonably could have expected a trespassing child to comprehend the dangers attendant to the structure or condition.[107] Rather than making this a factual determination on a case-by-case basis, Indiana courts have established arbitrary categories of structures or conditions which as a matter of law the possessor may expect children to appreciate. Thus, a possessor may always assume that children will avoid conditions which involve the risks of drowning,[108] falling from a height,[109] and being injured by a soil cave-in.[110] If a trespassing child is injured by such a condition, recovery will be denied for want of duty unless a "latent" danger which a child is not likely to avoid can be shown to exist.[111]

The consequences of requiring such an arbitrary barrier of duty to be crossed before negligence principles become relevant are well illustrated in *Plotzki v. Standard Oil Co.*[112] In *Plotzki*, an eleven year-old boy drowned by stepping into an abrupt drop-off while wading in a water-filled excavation owned by the defendant. Recovery was denied for want of duty since children are held as a matter of law to appreciate the dangers of water. In

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the age of the child is very important. Indiana apparently has not set a fixed age limit on the application of the doctrine. *See* Lockridge v. Standard Oil Co., 124 Ind. App. 257, 267, 114 N.E.2d 807, 812 (1953).

[106]*See* PROSSER § 59, at 373.

[107]*Id.* § 59, at 371.

[108]Plotzki v. Standard Oil Co., 228 Ind. 518, 92 N.E.2d 632 (1950); Lockridge v. Standard Oil Co., 124 Ind. App. 257, 114 N.E.2d 807 (1953).

[109]Neal v. Home Builders, Inc., 232 Ind. 160, 190, 111 N.E.2d 280, 294 (1953).

[110]Anderson v. Reith-Riley Constr. Co., 112 Ind. App. 170, 44 N.E.2d 184 (1942).

[111]Lockridge v. Standard Oil Co., 124 Ind. App. 257, 114 N.E.2d 807 (1953) (raft on pond held not to constitute a latent danger).

[112]228 Ind. 518, 92 N.E.2d 632 (1950). For a criticism of *Plotzki*, see Note, *Landowner's Liability for Infant Drowning in Artificial Pond*, 26 IND. L.J. 266 (1951).

so holding, the *Plotzki* court ignored the allegations that the drop-off was concealed by the murkiness of the water, that the excavation was in plain view from a sidewalk only fifty yards away, and that it was located in an urban area frequented by large numbers of children. The burden of fencing the small area and the utility of maintaining the condition were never considred. One year later an eight year-old boy drowned in the same unguarded excavation, and recovery was again denied.[113]

The final element that the plaintiff must establish in order to recover on the basis of the attractive nuisance doctrine bears heavily upon the possessor's knowledge of the circumstances. To be liable, the possessor must have actual or constructive knowledge that: (1) children do or are likely to trespass upon his premises, (2) an attractive nuisance exists thereon, and (3) it is likely to injure them.[114] In addition, the child's injury must be the natural and probable consequence of the possessor's conduct.[115] This is simply the issue of negligence. If the possessor does not know or have reason to know that the above circumstances exist he is not required to take precautions. The standard of due care does not generally burden him in the first instance to police his premises to discover if these circumstances exist.[116] But once he is placed on notice, he must take reasonable precautions to protect trespassing children from unreasonable risks of harm. The utility of maintaining such a condition and the burden of eliminating its attendant risks are balanced against the probability of harm in determining whether the possessor acted reasonably under the circumstances.[117] Unlike the question of duty, this determination generally is made by the jury.

The attractive nuisance doctrine as it is presently applied in Indiana is needlessly complex and restrictive. Before a duty of due

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[113]Lockridge v. Standard Oil Co., 124 Ind. App. 257, 114 N.E.2d 807 (1953).

[114]243 Ind. at 205, 182 N.E.2d at 258.

[115]*Id.*

[116]PROSSER § 59, at 369.

[117]*See, e.g.*, Indianapolis Water Co. v. Harold, 170 Ind. 170, 83 N.E. 993 (1908) (log on canal served beneficial purpose for defendant). *See also* RESTATEMENT (SECOND) OF TORTS § 339(d) (1965). When the risk of danger is great, the probability of presence need not be high. *Cf.* Harris v. Indiana Gen. Serv. Co., 206 Ind. 351, 189 N.E. 410 (1933). On the other hand, a slight risk of harm when the probability of presence is high will be sufficient. *Cf.* Cincinnati & Hammond Spring Co. v. Brown, 32 Ind. App. 58, 69 N.E. 197 (1903).

care can be applied, the plaintiff must satisfy three arbitrary hurdles that limit the just application of the doctrine. The factors which are first considered as determinants of duty are reconsidered under the issue of whether a duty has been violated. Perhaps in recognition of these shortcomings, Indiana courts have been unwilling to adhere to the doctrine when its application would yield an unjust result. For example, in *Indiana Harbor Belt Railroad v. Jones*,[118] the Indiana Supreme Court held the possessor to a duty of due care simply on the basis of the foreseeability of the presence of a child at a place where he was exposed to an unreasonable risk of harm. In *Jones*, an eight year-old boy who was playing in a freight car on defendant's switch track was killed when the freight car door fell upon him. The attractive nuisance doctrine was inapplicable to the facts of the case, so the court set forth another basis of recovery. In sustaining the complaint against a demurrer, the *Jones* court held that the "probable presence of children upon property where a dangerous activity is being carried on imposes a duty of ordinary care upon the owner to anticipate their presence by keeping a lookout for them."[119] The court rejected the distinction between "active" and "passive" negligence and applied the same principle to conditions of the land by stating:

> [I]f the probable presence of children raises a duty to them of ordinary care, this may be violated before the children arrive by leaving things undone which ought to have been done in anticipation of their coming.
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> . . .
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> Whatever duty exists is not absolute but relative. . . . It is just another way of stating that the standard of care is that which would be exercised by an ordinary prudent person under the same or similar circumstances.[120]

The simplicity and forthrightness of *Jones* marked a refreshing departure from the cumbersome duty requirements of the attractive nuisance doctrine. Although *Jones* was once expected to eliminate much confusion in Indiana law,[121] it has been virtually ignored by the courts. Its most recent application of any consequence in the area of premises liability is found in *Neal v.*

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[118]220 Ind. 139, 41 N.E.2d 361 (1942). *See also* Cleveland, C.C. & St. L. Ry. v. Means, 59 Ind. App. 383, 104 N.E. 785 (1914).

[119]220 Ind. at 145, 41 N.E.2d at 363.

[120]*Id.* at 145-46, 41 N.E.2d at 364.

[121]*See* Harper, *Development in the Law of Torts in Indiana 1940-1945*, 21 IND. L.J. 447, 469 (1946).

Home Builders, Inc.[122] In a somewhat confused opinion, the *Neal* court apparently limited *Jones* to negligent acts other than a failure to keep trespassing children off the premises. This is inconsistent with the flexible approach taken by the *Jones* court. If *Jones* were correctly applied, there would be little need to adhere to the fiction of the attractive nuisance doctrine.

The harsh operation of the attractive nuisance doctrine has also been avoided by resort to the dangerous condition exception to the wilful-wanton rule. In *Wozniczka v. McKean,*[123] a five year-old child was injured upon coming in contact with a burning trash container located in the back of defendant's yard. It was not alleged that the child's presence was induced by attraction to the fire, and the child testified that his mother had warned him of the dangers of fire. The trial court granted defendant's motion for summary judgment on the ground that the case did not fall within the attractive nuisance doctrine. Conceding that the child was at best a licensee and possibly a trespasser, the court of appeals reversed and held that a duty of care arises when children and persons *non sui juris* are likely to come in contact with a dangerous force. Although this rule has been inappropriately termed an extension of the attractive nuisance doctrine,[124] it is clearly distinct in practical application.

III. Licensees

A. Licensees and the Wilful-Wanton Rule

A licensee by permission, or a bare licensee, is a person who is present upon the premises of another for his own convenience, curiosity, or entertainment.[125] He is distinguished from a trespasser only by virtue of the possessor's express or implied consent[126] or by a privilege conferred by law.[127] A licensee may be

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[122]232 Ind. 160, 111 N.E.2d 280 (1953).

[123]144 Ind. App. 471, 247 N.E.2d 215 (1969).

[124]Neal v. Home Builders, Inc., 232 Ind. 160, 172, 111 N.E.2d 280, 287 (1953). In Terre Haute E. & I. Traction Co. v. Stark, 74 Ind. App. 669, 127 N.E. 460 (1920), the court specifically held that the dangerous condition rule is not what is termed an "attractive nuisance." *Id.* at 671, 127 N.E. at 461. *See also* Harris v. Indiana Gen. Serv. Co., 206 Ind. 351, 189 N.E. 410 (1934) ("we doubt if this complaint could be sustained upon what is known as an attractive nuisance"); Cleveland, C.C. & St. L. Ry. v. Means, 59 Ind. App. 383, 104 N.E. 785 (1914).

[125]*E.g.,* Brown v. Kujawa, 142 Ind. App. 310, 234 N.E.2d 509 (1968).

[126]Faris v. Hoberg, 134 Ind. 269, 33 N.E. 1028 (1893).

[127]Woodruff v. Bowen, 136 Ind. 431, 34 N.E. 1113 (1893) (fireman).

an invitee who has either exceeded the scope of invitation[128] or has entered the possessor's premises for a purpose to which public invitation did not extend.[129] Although the social guest is generally the recipient of an invitation in fact, he is classified as a licensee in Indiana law.[130]

The law in Indiana is unclear as to what constitutes the duty owed by a possessor of land to a licensee. Many of the cases are couched in language equally apt to designate trespassers and licensees.[131] Thus, it is frequently held that the possessor owes the same duty to licensees that he owes to trespassers—he need only refrain from wilful or wanton conduct to escape liability.[132] As in cases involving trespassers, the wilful-wanton rule has been diluted to approximate a standard of reasonable care under the circumstances when the possessor is engaged in an activity and the licensee's presence is known or may reasonably be expected.[133] Additional exceptions to the wilful-wanton rule have evolved to mitigate its harsh operation when justice so requires. These exceptions are applicable to licensees as well as trespassers, and have been considered in the discussion of the duty owed to trespassers. The emphasis here will be placed upon the differences in Indiana law between the duty owed to licensees and that owed to trespassers.

B. The Duty Owed To Licensees

In *Fort Wayne National Bank v. Doctor,*[134] the court of appeals held that the law of negligence is irrelevant to the licensor-licensee relationship in Indiana. As a practical matter, this assertion of the law ignores the realities of the decision-making process. For many years the law of negligence has permeated the licensor-licensee relationship under the guise of the common law rules. As a doctrinal matter, the *Doctor* court reaffirmed the vitality of the common law classification system in the express

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[128]PROSSER § 60, at 376.

[129]East Hill Cemetery Co. v. Thompson, 53 Ind. App. 417, 97 N.E. 1036 (1912) (person walking through cemetery).

[130]Fort Wayne Nat'l Bank v. Doctor, 272 N.E.2d 876 (Ind. Ct. App. 1971).

[131]*See., e.g.*, Pittsburgh, C.C. & St. L. Ry. v. Simmons, 38 Ind. App. 427, 76 N.E. 883 (1906).

[132]*E.g.*, Lingenfelter v. Baltimore & O.S.W. Ry., 154 Ind. 49, 55 N.E. 1021 (1900).

[133]*See* p. 1011 *supra.*

[134]272 N.E.2d 876 (Ind. Ct. App. 1971).

language of Indiana law. Accordingly, Indiana judges must continue to manipulate ancient terminology that was designed to protect feudal notions of land ownership to adequately protect the interest in human safety. An analysis of *Doctor* is highly instructive in revealing the inadequacies of the common law approach. The *Doctor* court examined Indiana law in an effort to ascertain what constituted the duty owed by a possessor to a licensee. Unlike most courts, it recognized that "at this point . . . the law in Indiana becomes snarled."[135] The decision in *Doctor* exemplifies the conceptual and semantic difficulties inherent in the common law approach. Confused by precedent, the *Doctor* court declined to decide which existing standard was most desirable or what exactly constituted the duty owed by a possessor to a licensee. With little elaboration, the court simply held that in this case the possessor was not liable under any existing standard.[136] The same result could have been reached by holding the possessor to a standard of reasonable care under the circumstances.

In *Doctor,* plaintiff-administrator brought an action for wrongful death arising out of the decedent's fatal fall down a stairway in defendant's home. The trial court granted summary judgment for the defendant. A primary issue on appeal was whether defendant had breached a duty that she owed to plaintiff. Relying on precedent, the *Doctor* court found that the Indiana Supreme Court had previously adopted at least four different tests to determine whether a possessor had breached a duty owed to a licensee. In *Woodruff v. Bowen,*[137] the court held that the possessor owed a licensee no duty other than to refrain from a positive wrongful act which may result in injury. Five years later, in *Barman v. Spencer,*[138] the court held that the possessor's only duty was to refrain from acts which would constitute gross negligence. In *Lingenfelter v. Baltimore & Ohio Southwestern Railway,* [139] an exception was noted to the general rule of nonliability in that the possessor must not wilfully or wantonly injure a licensee. More recently, in *Pier v. Schultz,*[140] the court held that a com-

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[135] *Id.* at 880.

[136] *Id.* at 882.

[137] 136 Ind. 431, 34 N.E. 1113 (1893).

[138] 49 N.E. 9 (Ind. 1898).

[139] 154 Ind. 49, 55 N.E. 1021 (1900).

[140] 243 Ind. 200, 182 N.E.2d 255 (1962). This is a paraphrase of the holding of *Pier.* The actual holding of the court was as follows:

plaint based on injury to a licensee must contain one of the following allegations to state a cause of action: (1) that the possessor committed a positive act, (2) that the possessor exercised control over an instrumentality, regardless of its character, or (3) that the condition complained of created a situation comparable to entrapment.

The court of appeals, on the other hand, "had begat a new doctrine," which the *Doctor* court concluded "had debauched the principle of wilfulness and wantoness."[141] In *Cleveland, Cincinnati, Chicago & St. Louis Railway v. Means*,[142] a case in which duty of care was held to arise from an unreasonable risk of foreseeable harm to children, the court alluded to the phrase "passive negligence" in a general statement of nonliability. With the impetus of this dictum, later courts utilized the phrase to support a finding of nonliability when licensees were injured by mere conditions of the premises.[143] Although liability for "active negligence" was implicit in these holdings, the active negligence doctrine was not relied upon by counsel until *Olson v. Kushner*.[144] In *Olson*, plaintiff was injured upon falling down a wet and slippery stairway at defendant's home. Plaintiff alleged, among other things, that defendant had provided him with a defective umbrella which would collapse when exposed to air currents. Finding this to be

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> Since it is not alleged that the instrumentality, of which appellant complains, was of such a character that its presence upon the property of appellees created a condition comparable to entrapment, and since it is not alleged that the appellees, as owners of the property, committed any positive act or exercised any positive control over the instrumentality, regardless of its character, and since it affirmatively appears from the complaint that the person injured was either a trespasser or a mere licensee by permission upon the property of appellees, the complaint does not state facts sufficient to constitute a cause of action *under the general rules of negligence.*

Id. at 204, 182 N.E.2d at 257 (emphasis added). Although the *Pier* court seemingly held that a positive negligent act was sufficient to constitute a cause of action, the *Doctor* court interpreted this holding to require a positive wilful act before recovery would be permitted. 272 N.E.2d at 882.

[141]272 N.E.2d at 881.

[142]59 Ind. App. 383, 104 N.E. 785 (1914).

[143]Olson v. Kushner, 138 Ind. App. 73, 211 N.E.2d 620 (1965); Millspaugh v. Northern Ind. Pub. Serv. Co., 104 Ind. App. 540, 12 N.E.2d 396 (1938); Thistlethwaite v. Heck, 75 Ind. App. 359, 128 N.E. 611 (1920); East Hill Cemetery Co. v. Thompson, 53 Ind. App. 417, 97 N.E. 1036 (1912). The *Doctor* court overruled these cases insofar as they applied a standard of active-passive negligence. 272 N.E.2d at 882.

[144]138 Ind. App. 73, 211 N.E.2d 620 (1965).

the only allegation of active negligence, the *Olson* court sustained defendant's demurrer to the complaint since it did not allege that defendant knew, or in the exercise of reasonable care should have known, that the umbrella would collapse.

This apparent recognition of the active negligence doctrine by the *Olson* court aligned Indiana with the prevailing view that "as to any active operations which the occupier carries on, there is an obligation to exercise reasonable care for the licensee."[145] The growth of the active negligence doctrine as a mechanism of providing relief from the harsh operation of the common law rules parallels the growth of negligence law generally. At common law, there was a fundamental distinction between misfeasance and nonfeasance.[146] Essential to liability for nonfeasance was a relationship between the parties giving rise to a duty to act.[147] Since the licensee is on the premises for his own convenience, the licensor-licensee relationship is insufficient to support an affirmative duty of care. Absent an obligation to act, the possessor's failure to act cannot be regarded as negligence. Liability for misfeasance, on the other hand, was imposed when one engaged in active conduct injured another.[148] The positive act itself gave rise to a duty of care. Accordingly, courts, disenchanted with the limited duty conferred upon the possessor, were far readier to invoke the law of negligence when an injury arose from active conduct as opposed to a condition of the premises.[149]

Rather than simply accept the active negligence doctrine and hold it inapplicable to the facts at hand, the *Doctor* court engaged in "a process of partial disentanglement" in an effort to eliminate confusion from existing law. *Barman* was easily disposed

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[145]PROSSER § 60, at 379. *See also* Annot., 49 A.L.R. 778 (1927); Annot., 156 A.L.R. 1226 (1945).

[146]*See* Bohlen, *Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908).

> There is no distinction more deeply rooted in the common law and more fundamental than that between mis-feasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.

Id. at 219.

[147]PROSSER § 56, at 339.

[148]*Id.*

[149]*See* James, *supra* note 27, at 174.

of since degrees of negligence are not recognized in Indiana. *Means* and other cases[150] recognizing the active negligence doctrine were overruled insofar as they applied a standard of active-passive negligence. Such a distinction, the court noted, "is inconsistent with the holdings of our Supreme Court on the same subject, violates the prohibition against degrees of negligence, and created an *undefined negligence doctrine* where no logical basis exists for so doing."[151] The basis of this holding has little support. In *Indiana Harbor Belt Railroad v. Jones*,[152] the supreme court also found that no sound basis existed for the distinction between active and passive negligence. However, the *Jones* court did not consider the law of negligence irrelevant to the licensor-licensee relationship. It simply applied a standard of ordinary care under the circumstances. To hold that the active negligence doctrine is undefined disregards the fact that the distinction is applied in numerous jurisdictions[153] and is recognized by the commentators.[154] The logical basis for applying the doctrine is that it provides relief from the harsh operation of the common law classification system in jurisdictions unwilling to directly confront precedent.

In noting that the active-passive distinction could arguably be said to denote types rather than degrees of negligence, the *Doctor* court advanced the soundest reason for abrogating the active negligence doctrine—"this argument is too fine spun to do anything more than add to the existing confusion in this area of the law."[155] Had the court replaced the doctrine with the standard of reasonable care under the circumstances, as the *Jones* court did, it would have achieved its goal of clarifying Indiana law. Attempted definitions of active and passive conduct have relied heavily on discerning the point in time at which the possessor's activity occurred prior to the injury.[156] On this basis, the difference is simply one of degree which varies infinitely with the cir-

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[150] *See* cases cited note 143 *supra*.

[151] 272 N.E.2d at 882.

[152] 220 Ind. 139, 41 N.E.2d 361 (1942).

[153] *See* Annot., 49 A.L.R. 778 (1927); Annot., 156 A.L.R. 1226 (1945).

[154] *See* PROSSER § 60, at 379; James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 610 (1954).

[155] 272 N.E.2d at 882.

[156] *See* Smith, *Liability of Landowners to Children Entering Without Permission*, 11 HARV. L. REV. 349 (1898):

> The first case is that of a known, present and immediate danger, one which is imminent and reasonably certain to result in harm, un-

cumstances. This approach becomes arbitrary when the possessor, by his affirmative conduct, creates a condition which results in injury. For example, in *Lingenfelter v. Baltimore & Ohio Southwestern Railway,*[157] defendant permitted the public as licensees to cross its premises. Defendant obstructed the path with a freight car, and plaintiff, in attempting to go around it, fell into an unguarded pit. Recovery was denied because a licensee cannot "recover for injuries caused by obstructions or pitfalls thereon."[158] On the other hand, in *Midwest Oil Co. v. Storey,*[159] the possessor dug an excavation upon his premises in an area which licensees were in the habit of crossing. Plaintiff, unaware that the change of condition had taken place, fell into the excavation and was severely injured. In finding for the plaintiff, the court held that the possessor was under a duty not to do any *positive act* which would increase the licensee's hazard. In both *Lingenfelter* and *Storey,* the possessor had failed to warn a licensee of a change made in the condition of the premises. Under similar circumstances, different results were reached. The characterization made by the *Storey* court was but an indirect way of requiring the possessor to conduct himself with ordinary care when the presence of licensees was foreseeable and it could reasonably have been anticipated that the change of condition would not be observed. The same result has been reached in similar cases by applying the wilful-wanton rule.[160]

> less the owner then and there does, or omits to do, some act, the doing or omitting of which would avoid the danger. In the second case the danger may be said to exist chiefly in anticipation. It depends on the course of future events, upon circumstances as yet unknown and fortuitous. In the first case the duty imposed upon the landowner involves simply a temporary, generally only a momentary, interruption of his user . . . . In the second case the duty sought to be established is to guard against future dangers. It must frequently involve permanent changes in the mode of user, sometimes necessitating such expense and trouble as would be practically prohibitive of certain modes of user, and in some cases compelling the abandonment of all profitable use.

Id. at 364-65. *See also* James, *supra* note 27, at 174-75.

[157]154 Ind. 49, 55 N.E. 1021 (1900).

[158]*Id.* at 52, 55 N.E. at 1022.

[159]134 Ind. App. 137, 178 N.E.2d 468 (1961).

[160]*See* Penso v. McCormick, 125 Ind. 116, 25 N.E. 156 (1890) (mound of hot embers on lot frequented by licensees); Graves v. Thomas, 95 Ind. 361 (1883) (excavation for cellar made upon lot adjoining sidewalk); Carskaddon v. Mills, 5 Ind. App. 22, 31 N.E. 559 (1892) (barbed wire fence erected with-

Ostensibly in an effort to avoid the conceptual and semantic difficulties involved in defining active and passive negligence, the *Doctor* court found the law of negligence irrelevant to the licensee-licensor relationship.[161] With this accomplished, the court capitulated and set forth its own ambiguous rule in holding that the possessor would only be liable for *action* "which would constitute either a positive wrongful act or wilful or wanton misconduct or conduct which would amount to entrapment."[162] In each of these theories the court found the element of wilfulness and held that the possessor would only be liable when his conduct transcended negligence.[163]

A more logical approach than *Doctor* would have been to resolve the case under the ordinary rules of negligence. The alleged defect in the condition of the stairway was either obvious or was within the knowledge of the decedent.[164] Therefore, the possessor was free to assume that the decedent would take reasonable precautions for her own safety. Whether it be held that the possessor exercised reasonable care in relying upon this assumption, or simply was under no duty to act, the same result is attained. The confusion in this area of Indiana law is not caused by the quantum of standards recognized by the courts. The nature of these standards is the heart of the problem. The arbitrary rules of the common-law classification system have become so embedded in Indiana law that the judges find it easier to manipulate the older concepts than to directly confront precedent. *Pierce v. Walters*,[165] decided one year after *Doctor*, supports this conclusion.

In *Pierce*, the plaintiff, one of fifteen grandchildren visiting defendant's farm, was hiding in tall grass and weeds on a pond dam when he was run over by a truck driven by defendant. The record indicated that the defendant was working on a portion of the premises which was accessible only by crossing the dam, and that he had heard the child being admonished to stay away

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out notice over path used by licensees). In permitting recovery, the courts emphasized the foreseeability of grave harm.

[161]272 N.E.2d at 883.

[162]*Id.*

[163]*Id.* This holding seems contrary to the holding in *Pier*. *See* note 140 *supra*.

[164]The stairway was well lit and the decedent had descended it on numerous occasions. *Id.* at 878.

[165]283 N.E.2d 560 (Ind. Ct. App. 1972).

from the dam on the date of the accident. Finding that no material fact existed from which a jury could find that defendant had breached a duty owed to plaintiff, the trial court granted defendant's motion for summary judgment. In reversing the judgment, the court of appeals unequivocally set forth the common law rule that "the only duty of the owner of the property upon which the licensee enters is to refrain from wilfully or intentionally injuring the licensee," and stated that this "law is so well established in this state that it needs no citation of authority."[166] On its face, this statement of the law should have precluded the consideration of the issue of negligence. Indiana courts have long held that "wilfullness and negligence are diametrically opposed."[167] However, the *Pierce* court made it clear that it was holding defendant to a duty of reasonable care under the circumstances. Upon reviewing the evidence, the court found that questions of fact existed as to whether defendant had actual or constructive knowledge of the plaintiff's presence. However, the issues of fact would be immaterial unless a jury could infer that defendant had breached his duty to refrain from wilful or intentional injury. Although the facts in evidence seemed to indicate nothing more than an honest mistake in judgment on the part of the defendant, the trial court's refusal to submit the case to the jury was held to be reversible error. The court held that if the jury were to find that defendant had actual or constructive knowledge of the plaintiff's presence, then its function would be to determine whether defendant had been "wilfully or wantonly negligent."[168] Thus, questions of fact existed as to whether defendant acted as a reasonable and prudent person when he drove his truck across the dam without taking precautions.

The exceptions that have been carved from the wilful-wanton rule have rendered it more a formality than a legal reality. The most significant change that would occur by applying a standard

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[166] *Id.* at 562.

[167] Barrett v. Cleveland, C.C. & St. L. Ry., 48 Ind. App. 668, 96 N.E. 490 (1911); Stauffer v. Schlegel, 74 Ind. App. 431, 129 N.E. 44 (1920). "Negligence and wilfulness are incompatible, and the former cannot be to such a degree as to become the latter. . . ." *Id.* at 435, 129 N.E. at 46.

[168] 283 N.E.2d at 562. Other courts have justly criticized the self-contradictory use of this phrase. "Negligence and wilfulness are as unmixable as oil and water. 'Wilful negligence' is as self-contradictory as 'guilty innocence.'" Kelly v. Malott, 135 F. 74, 76 (7th Cir. 1905). Professor Eldredge stated that to "speak of 'wilful negligence' is like talking of a 'black white' object." Eldredge, *Tort Liability to Trespassers*, 12 TEMPLE L.Q. 32, 33 (1937).

of ordinary care to the licensor-licensee relationship would be honesty of expression. The active negligence doctrine has reappeared under *Pierce* by the misnomer of "wilful and wanton negligence." Thus, the possessor is required to conduct his activities with the thought in mind that licensees may be within the zone of danger. The duty of care may require the possessor to maintain a lookout for licensees, a precaution not generally required for the benefit of trespassers.[169] When it is difficult to ascertain whether the licensee has been injured by an activity of the possessor or by a condition of the premises,[170] recovery may be permitted under either the wilful-wanton rule or the positive wrongful act rule. However it is labeled, the true basis for recovery in this instance is the creation of a foreseeable and unreasonable risk of harm without taking reasonable precautions.

The rule that the licensee takes the premises as he finds them has been modified to require the possessor to disclose concealed dangerous conditions that are known to him. Frequently termed the "concealed trap doctrine," the rule reflects a judicial consensus that licensees are at least entitled to equal knowledge of the dangers of the premises.[171] The possessor need not warn of known or obvious dangers,[172] and the licensee generally assumes the risk of dangers concealed only by darkness.[173] The cases indicate an effort on the part of the courts to find known concealed dangers in order to invoke the law of negligence. For example, in *Carrano v. Scheidt*,[174] the plaintiff was injured when she slipped upon a throw rug on a highly polished floor in defendant's home. The trial court granted summary judgment in favor of defendant since plaintiff was a licensee who took all risks as to the condition of the premises. The Seventh Circuit Court of Appeals reversed, holding that under Indiana law "a knowing owner may be held liable for injury to a licensee if the owner does not warn the unwitting licensee of a hidden peril."[175] The backing had worn off the rug after numerous washings, and defendant was previously

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[169]PROSSER § 60, at 380.

[170]*See* notes 157, 159 *supra* & accompanying text.

[171]*See* PROSSER § 60, at 381.

[172]*E.g.*, Standard Oil Co. v. Meissner, 102 Ind. App. 552, 200 N.E. 445 (1936).

[173]*See* Lingenfelter v. Baltimore & O.S.W. Ry., 154 Ind. 49, 55 N.E. 1021 (1900).

[174]388 F.2d 45 (7th Cir. 1967).

[175]*Id.* at 47.

informed of the dangerous condition. Since the defendant had accompanied the plaintiff to the room prior to the injury, a warning would not have been unduly burdensome. The court held that under these circumstances a jury should be permitted to determine whether defendant had been negligent in failing to warn of the dangerous condition.

C. The Social Guest

While persons with whom the possessor maintains a social relationship are commonly "invited" to enter his premises, Indiana law classifies the social guest as a licensee.[176] The purpose of the social guest's visit is to confer social rather than economic benefit upon the possessor, and this is insufficient to satisfy the present tests of invitee status.[177] A social guest cannot elevate his status by performing gratuitous tasks for his host.[178] The reason advanced by the courts for denying the social guest the preferred status of invitee is that he cannot and does not expect to be treated any differently than a member of the host's family.[179] Rather than determining the expectations of the parties as a matter of law, it would be more reasonable to determine the duty of care required on a case-by-case basis. Suits by social guests against their hosts did not arise in Indiana until the past decade.[180] Professor James has attributed the similar national trend to the fact that a host is usually in no better financial position to bear the loss than the guest.[181] However, the recent availability of inexpensive liability insurance has emerged as an important reason for eliminating the immunity of the host.[182] Moreover, holding the possessor liable for injuries suffered by social guests on property not reasonably safe places the incentive for precaution upon the party best suited to prevent accidents.

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[176]Fort Wayne Nat'l Bank v. Doctor, 272 N.E.2d 876 (Ind. Ct. App. 1971); Brown v. Kujawa, 142 Ind. App. 310, 234 N.E.2d 509 (1968); Olson v. Kushner, 138 Ind. App. 73, 211 N.E.2d 620 (1965).

[177]*See* note 183 *infra* & accompanying text.

[178]Fort Wayne Nat'l Bank v. Doctor, 272 N.E.2d 876, 883 (Ind. Ct. App. 1971).

[179]*See id.* at 880.

[180]The social guest was not classified as a licensee in Indiana until 1965. *See* Olson v. Kushner, 138 Ind. App. 73, 75, 211 N.E.2d 620, 621 (1965).

[181]James, *supra* note 154, at 611-12.

[182]*See* Comment, *Status of the Social Guest: A New Look*, 7 WM. & MARY L. REV. 313, 319 (1966).

IV. Invitees

A. *The Tests of Invitee Status*

In determining whether an entrant is entitled to the status of invitee most courts apply one or both of two tests: "economic benefit" and/or "public invitation."[183] While the satisfaction of either test yields the same result—an affirmative duty to make the premises safe for the invitee's reception—the rationales relied upon for imposing this obligation are distinctly different. The economic benefit test proceeds upon the assumption that the duty to make the premises safe is assumed by the possessor only in return for some consideration or benefit.[184] This duty of care is "the price he must pay for the benefit, present or prospective, to be derived from the visitor's presence."[185] To satisfy this test, the possessor must have a real or potential percuniary interest in the visitor's presence, and the purpose of the visit must be to confer such a benefit. The public invitation test, on the other hand, derives the basis of duty from the invitation itself, and the assurance that it carries, rather than from a bargained for exchange. The rationale behind this test is that when one expressly or impliedly invites the public to enter his land or parts thereof, he impliedly represents that reasonable care has been exercised to make it safe for public reception.[186] The duty is limited to members of the public who use the land for the purpose for which it was opened.[187] The accrual of economic benefit automatically qualifies the entrant as an invitee under the public invitation

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[183]Prosser § 61, at 389; James, *supra* note 154, at 612-14; Comment, *supra* note 11, at 163.

[184]Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 U. Pa. L. Rev. 209, 337 (1905). Professor Bohlen was perhaps the leading proponent of the economic benefit test. As Reporter for the first *Restatement*, Bohlen no doubt influenced its exclusive adoption of the economic benefit test. Restatement of Torts § 332 (1934).

[185]Prosser § 61, at 386.

[186]For an exhaustive analysis of the rationale and history of the public invitation test, see Prosser, *Business Visitors and Invitees*, 26 Minn. L. Rev. 573 (1942). Prosser traced the origin of both tests to the English case of Parnaby v. Lancaster Canal Co., 11 Ad. & El. (1839). *See also* Comment, *supra* note 11, at 163.

[187]*See, e.g.*, East Hill Cemetery Co. v. Thompson, 53 Ind. App. 417, 97 N.E. 1036 (1912) (person walking through cemetery for purpose other than paying respect to the dead classified as licensee). The purpose for which the premises were opened is viewed objectively. *See* James, *supra* note 154, at 618-19.

test.[188] An invitation requires more than consent, and the circumstances must be such as would lead a reasonable man to believe that his presence is welcome—not just tolerated.[189] While an invitation is an essential element of each test, it alone is insufficient to give rise to a duty of care. The social guest, while clearly invited, is considered a licensee by the great majority of jurisdictions.[190] His invitation is generally a private one, and his relationship with the possessor is one of social rather than pecuniary interest.

The economic benefit test has been expressly recognized by Indiana courts, and its scope modified to include common interest and mutual benefit as factors giving rise to a duty of care.[191] Many of the recent cases contain language which, arguably, recognizes the economic benefit test as the sole determinant of invitee status.[192] If a technical invitation can only be found on the basis of the economic benefit test, the application of the rule poses several problems. First, exclusive reliance upon economic benefit cannot be reconciled with precedent. Dean Prosser convincingly demonstrated that public invitation was the first test of invitee status recognized by the common-law courts.[193] As applied to the develop-

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[188]*See* Comment, *supra* note 11, at 163.

[189]Prosser, *supra* note 186, at 586.

[190]*E.g.*, Olson v. Kushner, 138 Ind. App. 73, 211 N.E.2d 620 (1965).

[191]*E.g.*, Beaning v. South Bend Elec. Co., 45 Ind. App. 261, 90 N.E. 786 (1910) (utility companies and city had common interest in having employee of city repair defective wires on utility pole). Common interest generally is interpreted to mean common pecuniary interest. *See, e.g.*, Verplank v. Commercial Bank, 145 Ind. App. 324, 251 N.E.2d 52 (1969).

[192]Only two recent cases have used language which suggests that public invitation may be a legitimate determinant of invitee status. *See* Rust v. Watson, 141 Ind. App. 59, 217 N.E.2d 859 (1966) (area occupied by public as invitees); New York Cent. R.R. v. Wyatt, 135 Ind. App. 205, 184 N.E.2d 657 (1962) (person crossing railroad tracks while making delivery to distillery).

[193]Prosser, *supra* note 186. Prosser's article appeared at a time during which the economic benefit test was considered the only test of invitee status by most commentators. *See* R. CAMPBELL, LAW OF NEGLIGENCE, 29-30 (1871); F. HARPER, LAW OF TORTS § 98 (1933); J. SALMOND, LAW OF TORTS § 162 (11th ed. 1953); Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 U. PA. L. REV. 239, 337 (1905). The first *Restatement* also adopted this approach. RESTATEMENT OF TORTS § 332 (1934).

After an exhaustive analysis of the case law, Prosser concluded that the "Restatement of the Law of Torts is wrong." Prosser, *supra* note 186, at 612. Prosser later became Reporter for the second *Restatement* and the pub-

ment of a test in Indiana, Prosser's analysis seems significantly on point. An examination of early Indiana cases indicates that economic benefit received little or no mention. For example, in *Howe v. Ohmart,*[194] a person attending a free college literary society meeting was deemed an invitee without reference to potential pecuniary gain. Had the *Howe* court applied the economic benefit test, it is doubtful that the plaintiff would have recovered. When economic benefit was considered by the courts, it was primarily in dicta and was referred to simply because its presence gave rise to the inference of an invitation.[195] The prime concern of most courts was whether a representation of safety could be inferred from the circumstances surrounding the invitation.[196] Support for this conclusion can readily be found in *Lake Erie & Western Railroad v. Fleming,*[197] wherein the Indiana Supreme Court held:

> [I]f mutuality of interest is one of the essential facts from which to infer an invitation, then it sufficiently appears .... But this court has expressly denied the doctrine which prevails in some jurisdictions that mutual advantage must appear before an invitation can be implied. . . .[198]

Despite this clear statement of authority, Indiana courts began to insist that some form of pecuniary advantage or common interest be shown before the status of invitee would be conferred.[199]

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lic invitation test was incorporated as a determinant of invitee status. RESTATEMENT (SECOND) OF TORTS § 332 (1965).

[194]7 Ind. App. 32, 33 N.E. 466 (1893).

[195]*See, e.g.,* Baltimore & O.S.W. Ry. v. Slaughter, 167 Ind. 330, 79 N.E. 186 (1906); Pittsburgh, C.C. & St. L. Ry. v. Simons, 168 Ind. 333, 79 N.E. 911 (1907); Bartholomew v. Grimes, 51 Ind. App. 614, 100 N.E. 12 (1912). In one case, the plaintiff argued both theories of status determination, but the court held that he could not recover under either theory since he was injured by a known and appreciated risk. Clark v. City of Huntington, 74 Ind. App. 437, 127 N.E. 301 (1920).

[196]*See, e.g.,* Indiana, B. & W. Ry. v. Barnhart, 115 Ind. 399, 16 N.E. 121 (1888) (without mention of economic benefit the court found invitation by enticement and inducement).

[197]183 Ind. 511, 109 N.E. 753 (1915).

[198]*Id.* at 519-20, 109 N.E. at 756.

[199]Prosser has concluded that the notion the economic benefit test is exclusive originated in the minds of a long forgotten treatise writer, Robert Campbell. Prosser, *supra* note 186, at 583. R. CAMPBELL, LAW OF NEGLIGENCE (2d ed. 1878) was a popular authority for the test in some early Indiana

The exclusive reliance upon the economic benefit test has caused Indiana courts to attenuate the concept of economic benefit to unreasonable extremes. A child accompanying a parent to a store[200] or a person waiting at a railroad depot for a friend[201] can hardly be said to have conferred a real pecuniary benefit upon the possessor. Persons crossing railroad tracks at a particular point have been found to have conferred economic benefit upon the railroad because the railroad was saved the expense of providing public crossings.[202] Similarly, the guest of a social club president[203] and a mourner at a funeral service[204] have been held to qualify as invitees. It seems that in these situations the potential economic benefit is negligible or nonexistent, and the public invitation test would more appropriately apply. However, the economic benefit test more legitimately explains an entrant's status when a private invitation has been extended. In this instance, the affirmative duty of care cannot be based upon a broad representation to the public that the premises are in safe condition. The courts must look to the terms of the invitation rather than the fact of invitation to imply a representation of safety. Thus, the personal relationship between the entrant and possessor and the circumstances under which the invitation was extended are of great significance.[205] Employees of the possessor[206] and persons invited upon the premises to make repairs[207] easily qualify as invitees on this basis.

Both theories of status determination readily explain the entrant's status of invitee when the possessor has held his premises open to the public with the expectation of deriving pecuniary

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cases. *See* Cleveland, C.C. & St. L. Ry. v. Powers, 173 Ind. 105, 88 N.E. 1073 (1909); East Hill Cemetery Co. v. Thompson, 53 Ind. App. 417, 97 N.E. 1036 (1912).

[200]L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942).

[201]New York, C. & St. L. Ry. v. Mushrush, 11 Ind. App. 192, 37 N.E. 954 (1894).

[202]Pittsburgh, C.C. & St. L. Ry. v. Simons, 168 Ind. 333, 79 N.E. 911 (1907).

[203]Rush v. Hunziker, 216 Ind. 529, 24 N.E.2d 931 (1940).

[204]Hickey v. Shoemaker, 132 Ind. App. 136, 167 N.E.2d 487 (1960).

[205]Prosser, *supra* note 186, at 602.

[206]*See, e.g.*, Tyler v. Nolen, 144 Ind. App. 665, 248 N.E.2d 186 (1969) (maid).

[207]*See, e.g.*, Rink v. Lowry, 38 Ind. App. 132, 77 N.E. 967 (1906) (person invited to repair telephone injured while inside elevator shaft).

gain.[208] This is the most common situation encountered by the courts, and perhaps explains why Indiana courts seem content to ignore the public invitation test. However, the status of invitee has been conferred upon persons whose presence cannot reasonably be accounted for under either test. For example, in *Hollowell v. Greenfield,*[209] an eleven year-old boy was injured at his father's place of employment while playing with a machine. Recognizing that the line between the status of invitee and licensee is often difficult to draw, the court held that the jury could properly have found the child to be an invitee. In so holding, the court paid particular attention to the fact that the boy's father had occasionally paid him twenty-five cents for his assistance, and the fact that the father's employer had observed the boy either playing or working on at least four previous occasions. Under existing case law,[210] however, the mere rendering of minor services for the benefit of the possessor should not have been sufficient to elevate his status from that of licensee to invitee. Only by attenuating the economic benefit test could the court deem negligence a relevant consideration.

Under either the economic benefit test or the public invitation test the purpose of the entrant's visit is determinative of duty.[211] Accordingly, the courts have placed great emphasis upon the entrant's state of mind at the time of injury. *Standard Oil Co. v. Scoville*[212] presents a striking example of how a shift in mental attitude affects liability. The plaintiff had paid his fuel bill at defendant's office and was walking to defendant's parking lot when he decided to return inside to discuss a personal matter. Upon leaving the building for the second time he slipped while descending a wet and muddy stairway and was injured. Although he had never left defendant's premises, recovery was denied for want of duty. Conceding that the plaintiff was an invitee the first time he walked down the stairs, the court held that when he returned inside for the second time he was a mere licensee. By

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[208] *See, e.g.*, Robertson Bros. Dep't Store v. Stanley, 228 Ind. 372, 90 N.E.2d 809 (1950); Comment, *supra* note 11, at 164-65.

[209] 142 Ind. App. 344, 216 N.E.2d 537 (1966).

[210] Fort Wayne Nat'l Bank v. Doctor, 272 N.E.2d 876 (Ind. Ct. App. 1971).

[211] *See, e.g.*, Standard Oil Co. v. Henninger, 100 Ind. App. 674, 196 N.E. 706 (1935); East Hill Cemetery Co. v. Thompson, 53 Ind. App. 417, 97 N.E. 1036 (1912).

[212] 132 Ind. App. 521, 175 N.E.2d 711 (1961). *See* Annot., 32 A.L.R.3d 496 (1970).

placing such emphasis on the entrant's subjective state of mind, the unscrupulous plaintiff is encouraged to fabricate, ex post facto, a purpose sufficient to withstand a status determination.[213] Moreover, it obfuscates the real issues that should be considered in permitting or denying recovery.

Although the formal pronouncement of the public invitation test as a valid determinant of duty would eliminate a great deal of confusion in Indiana law, this approach is not wholly satisfactory. The common-law classification system is already replete with arbitrary rules of status determination that the courts often must misinterpret to reach a just result. Only by abrogating the common-law classification system and replacing it with the standard of ordinary care, would the courts have a workable approach which would permit factual variations to be placed in their proper perspectives. The factors of economic benefit, public invitation, and purpose of entrance would retain their importance. The basic difference under a negligence framework would be that these factors would no longer determine whether the issue of negligence would even be reached. The foreseeability of harm, the gravity of potential harm, and the burden of taking precautions would receive due consideration. If the real basis of duty is the reasonable expectations of the parties, their actual expectations are more logically considered on a case-by-case basis.

B. The Duty Owed to Invitees

Once an entrant attains the status of invitee, he is entitled to assume that the possessor has exercised reasonable care to make the premises safe for his reception.[214] The duty owed by the possessor is simply one of reasonable care under the circumstances. The various rules that have developed in this are are but specific

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[213]PROSSER § 61, at 387. In Standard Oil Co. v. Henninger, 100 Ind. App. 674, 196 N.E. 706 (1935), plaintiff was injured while searching for a toilet at a gasoline station. The complaint alleged that plaintiff was an invitee on the ground that defendant induced his customers to enter by advertising free maps and toilet facilities. The whole trial was conducted upon this theory. However, plaintiff's attorney failed to introduce evidence supporting this allegation. Instead, he introduced evidence that plaintiff decided to buy gasoline from the defendant prior to the injury. Recovery was denied. The case could have been sound authority in Indiana for the public invitation test had not plaintiff's attorney relied solely upon an alleged change of mind in an effort to fit the facts of the case to the economic benefit test.

[214]Robertson Bros. Dep't Store v. Stanley, 228 Ind. 372, 90 N.E.2d 809 (1950).

clarifications of this standard.[215] Since one ground for imposing the duty of care is the possessor's superior knowledge of the premises,[216] he must have actual or constructive knowledge that the premises are unsafe before he can be held liable for his negligence.[217] The possessor is required to anticipate which parts of the premises will be traversed both incidentally and necessarily by an invitee acting within the purpose and scope of the invitation.[218] The duty extends to all such areas, and the possessor must make them accessible by providing a safe and suitable means of ingress and egress.[219] The duty of care is an active and continuous one.[220] Accordingly, the possessor is affirmatively bound to make such inspections as a reasonable and prudent man would make to discover defects of which he is unaware.[221] The duty of inspection arises from the possessor's knowledge of possible defects and their reasonable probability,[222] and he will be charged with such knowledge if either he or his agents could have discovered the defect in the exercise of reasonable care.[223] The emphasis here is on reasonableness, and in the absence of notice the possessor need not make inspections of a minute character to discover latent defects.[224] However, the continued use of an object over a long period of

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[215]Rust v. Watson, 141 Ind. App. 59, 217 N.E.2d 859 (1966) (duty to inspect is further clarification of the standard of reasonable care under the circumstances).

[216]*See, e.g.*, Clark v. City of Huntington, 74 Ind. App. 437, 127 N.E. 301 (1920).

[217]*E.g.*, Great A. & P. Tea Co. v. Custin, 214 Ind. 54, 13 N.E.2d 542 (1938); Kroger Co. v. Troy, 122 Ind. App. 381, 105 N.E.2d 174 (1952).

[218]*E.g.*, Silvestro v. Walz, 222 Ind. 163, 51 N.E.2d 629 (1943). *But cf.* Standard Oil Co. v. Henninger, 100 Ind. App. 674, 196 N.E. 706 (1935).

[219]*E.g.*, F.W. Woolworth Co. v. Moore, 221 Ind. 490, 48 N.E.2d 644 (1943) (stairway); Verplank v. Commercial Bank, 145 Ind. App. 324, 251 N.E.2d 52 (1969) (sidewalk).

[220]*E.g.*, Robertson Bros. Dep't Store v. Stanley, 228 Ind. 372, 90 N.E.2d 809 (1950).

[221]*Id.*; F.W. Woolworth Co. v. Moore, 221 Ind. 490, 48 N.E.2d 644 (1943).

[222]Evansville Am. Legion Home Ass'n v. White, 239 Ind. 138, 154 N.E.2d 109 (1958).

[223]*E.g.*, Robertson Bros. Dep't Store v. Stanley, 228 Ind. 372, 90 N.E.2d 809 (1950).

[224]Evansville Am. Legion Home Ass'n v. White, 239 Ind. 138, 154 N.E.2d 109 (1958) (defective chair).

time may in and of itself be sufficient to constitute notice that a defect exists.[225]

Even if a diligent search would not have disclosed the dangerous condition, the possessor will be charged with knowledge of its existence if it was created or permitted to exist by him or by persons under his control.[226] If the condition was created by third parties not under his control, he will be subject to liability only if he knows of the condition or could have known of it in the exercise of reasonable care.[227] In determining whether a reasonable inspection would have disclosed the condition, the courts will consider the character of the condition and the length of time it has been in existence. For example, in *Vaughn v. National Tea Co.*,[228] the plaintiff slipped on a lettuce leaf while shopping at defendant's store. Defendant argued on appeal that the evidence presented at trial was insufficient to show that he had breached a duty owed to plaintiff. Although there was no evidence showing that defendant had actual knowledge of the condition, the apellate court held that a jury could properly find that he had constructive knowledge of it. The lettuce leaf was shown to have been discolored and rotten at the time of the injury, which gave rise to the inference that it had been on the floor long enough to impose a duty upon the defendant to discover and remove it.

Since the rules of negligence are determinative of liability, the possessor is not an insurer of the invitee's safety.[229] While he may place his own terms upon the invitation, the invitee is entitled to full and open disclosure of these terms. The possessor may generally assume that the fully informed invitee will take precautions for his own safety.[230] Accordingly, a warning will generally

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[225]Rust v. Watson, 141 Ind. App. 59, 217 N.E.2d 859 (1966) (cable for lowering chandelier used thirty-four years). *But see* Clark Fruit Co. v. Stephan, 91 Ind. App. 152, 170 N.E. 558 (1930) (elevator gate).

[226]*E.g.*, William Laurie Constr. Co. v. McCullough, 174 Ind. 477, 90 N.E. 1014 (1910) (oiled floor); Thompson v. F.W. Woolworth Co., 100 Ind. App. 386, 192 N.E. 893 (1934) (obstructed aisle).

[227]*E.g.*, Kroger Co. v. Ward, 148 Ind. App. 399, 267 N.E.2d 189 (1971) (customers tracked water from parking lot into store).

[228]328 F.2d 128 (7th Cir. 1964).

[229]*E.g.*, Great A. & P. Tea Co. v. Custin, 214 Ind. 54, 13 N.E.2d 542 (1938).

[230]*Cf.* Gwaltney Drilling, Inc. v. McKee, 148 Ind. App. 1, 259 N.E.2d 710 (1970).

be sufficient to fulfill the duty of care.[231] A warning may not even be necessary if the dangerous condition is known or is likely to be obvious to the invitee.[232] If, however, a warning is likely to go unheeded,[233] or if the condition is of such a nature that it cannot be encountered with reasonable safety even if known and appreciated,[234] greater care than a warning is required.

Generally, the possessor is liable only for his own negligence and the negligence of his agents.[235] However, he may be negligent in failing to exercise reasonable care to protect the invitee from the negligent or intentional acts of the third parties not under his control whom he knowingly permits upon the premises.[236] He is bound to control or expel such persons if through his past experience or present observation he has reason to believe that they present an unreasonable risk of harm to the inviteee.[237] He will not be liable if he could not reasonably have anticipated or guarded against such harm's occurring.[238]

Courts frequently fall into the trap of erecting rigid rules on the basis of one particular circumstance rather than following the basic principle of reasonable care under all circumstances. In the recent case of *Hammond v. Allegretti*,[239] the Indiana Supreme Court renounced this practice by reversing a line of appellate court decisions[240] which held that the possessor owed no duty as

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[231] PROSSER § 61, at 394.

[232] *Cf.* Christmas v. Christmas, 305 N.E.2d 893 (Ind. Ct. App. 1974).

[233] Kroger Co. v. Ward, 148 Ind. App. 399, 267 N.E.2d 189 (1971) (signs warning of wet floor at store entrance held to be insufficient to satisfy duty of reasonable care under the circumstances).

[234] *See* Hickey v. Shoemaker, 132 Ind. App. 136, 167 N.E.2d 487 (1960) (ice at entrance to funeral home).

[235] *E.g.*, Glen Park Democratic Club, Inc. v. Kylsa, 139 Ind. App. 393, 213 N.E.2d 812 (1966).

[236] *Id.* (hotel owner owed duty of reasonable care to protect patrons from injury and insult at the hands of irresponsible persons whom he knowingly permitted on premises).

[237] PROSSER § 61, at 395.

[238] Yingst v. Pratt, 139 Ind. App. 695, 220 N.E.2d 276 (1966) (tavern owner justified in using force to repel robber and not liable for failure to exercise reasonable care).

[239] 311 N.E.2d 821 (Ind. 1974).

[240] Hammond v. Allegretti, 288 N.E.2d 197 (Ind. Ct. App. 1972); Kalicki v. Beacon Bowl, Inc., 143 Ind. App. 132, 238 N.E.2d 673 (1968). *See also*

a matter of law to remove natural accumulations of ice and snow from private parking lots. The *Hammond* court found that such a rule unjustifiably diluted well established tort principles, and the presence of such conditions should in no way diminish the duty of reasonable care.[241] What is reasonable in one situation may be unreasonable in another, and ultimate liability is a matter separate and distinct from the existence of a legal duty. Thus, the court emphasized that its holding should not be construed as an inflexible rule requiring the immediate removal of ice and snow.[242] The trier of fact must consider the vast range of evidence in arriving at a determination of liability or nonliability. The duty of ordinary care does not subject the possessor to strict liability. Recovery will be denied if the invitee is injured while outside the scope of his invitation[243] or while carrying out a purpose of his own.[244] As in negligence actions generally, contributory negligence[245] and incurred risk[246] are valid defenses. Unreasonable burdens are not imposed upon the possessor, and the burden of precaution must be equitable and reasonable in light of foreseeable risks of harm.[247]

Indiana judges have experienced little difficulty in applying the standard of ordinary care to find specific duties owed to an invitee. The standard was designed to accommodate an infinite variety of factual settings. The desirability of using the standard of ordinary care is easily seen by comparing the clarity of Indiana law as to what duties are owed to invitees with the confusion in the law regarding duties owed to licensees and trespassers. However, the present approach requires that a cumbersome status

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Boss-Harrison Hotel Co. v. Barnard, 148 Ind. App. 406, 266 N.E.2d 810 (1971); Halkias v. Gary Nat'l Bank, 142 Ind. App. 329, 234 N.E.2d 652 (1968).

[241] 311 N.E.2d at 826-28.

[242] *Id.* at 826.

[243] *See* Thistlethwaite v. Heck, 75 Ind. App. 359, 128 N.E. 611 (1920).

[244] *See* Standard Oil Co. v. Scoville, 132 Ind. App. 521, 175 N.E.2d 711 (1961) (person entering defendant's place of business to discuss personal problem).

[245] *E.g.*, Standard Oil Co. v. Meissner, 102 Ind. App. 552, 200 N.E. 445 (1936). Assumption of risk is also a defense. *See* Tyler v. Nolan, 144 Ind. App. 665, 248 N.E.2d 186 (1969).

[246] *See* Christmas v. Christmas, 305 N.E.2d 893 (Ind. Ct. App. 1974).

[247] 311 N.E.2d at 826. *See also* Hickey v. Shoemaker, 132 Ind. App. 136, 167 N.E.2d 487 (1960) (accumulation of ice at entrance to funeral parlor).

determination be made before the rules of negligence are permitted to operate. The public invitation test and the economic benefit test seem to be nothing more than legal fictions utilized to measure the reasonable expectations of the parties. The expectations of parties are more logically considered with the factual issues of foreseeability of harm, the burden of taking precautions, and other negligence considerations than with legal questions of status. The flexibility of the negligence formula is unnecessarily impeded by requiring that a status determination be made.

V. The Implications of the Negligence Approach

The duty of care owed by the possessor to an entrant is best determined on the basis of ordinary care in light of the circumstances. In reiteration, five basic arguments point strongly in favor of the abrogation of the common law classification system: (1) the policy rationale behind the common law system is no longer relevant to modern society,[248] (2) the negligence formula is a flexible vehicle for a fair determination of liability since it permits the determination of liability to be made on the basis of community standards,[249] (3) meritorious claims will no longer be denied solely on the basis of the entrant's status and more cases of this nature will progress beyond the pleading stage,[250] (4) the judicial waste involved in a preliminary status determination which serves to obscure rather than illuminate the issues worthy of scrutiny in a given case will be mitigated,[251] and (5) the confusion and the inconsistencies incident to judicial implementation of the common law system will to a large extent be eliminated.[252]

However, new problems of policy and law may be expected to arise with the implementation of the negligence approach. It has been suggested that actuarial realities may dictate a cost increase of landowner's insurance premiums.[253] Such an objection may be made to any expansion of the scope of tort liability, and should in no way diminish the desirability of the negligence ap-

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[248]*See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 101 (D.C. Cir. 1972). Hughes, *Duties To Trespassers*, 68 Yale L.J. 633, 694 (1969).

[249]Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 102 (D.C. Cir. 1972).

[250]*See, e.g.*, 25 Vand. L. Rev. 623, 636 (1972).

[251]*See, e.g., id.* at 634.

[252]*See, e.g.*, Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); 25 Vand. L. Rev. 623, 635 (1972).

[253]25 Vand. L. Rev. 623, 635 (1972).

proach in the area of premises liability. Society is largely predicated upon the allocation of burdens and responsibilities among its members,[254] and insurance is a viable means of transferring the risks incident to such burdens at a moderate cost.[255] The increase in the number of collusive claims has also been deemed an unfortunate potential consequence of the abrogation of the common law system.[256] However, this possibility exists under any standard of care, and is more appropriately dealt with by the criminal law than the law of premises liability.[257]

Perhaps the most difficult task that the courts will encounter in utilizing the negligence approach is the formulation of instructions which determine the extent to which the status of the entrant should bear upon the issue of liability. The negligence standard could readily be subverted by judicial reinstatement of the common-law rules through jury instructions which overly emphasize the character of entry.[258] The major decisions[259] which abrogated the common-law system have offered little insight as to how much weight would be given to the character of entry. It would seem, however, that the standard of care previously owed to invitees would be owed to entrants generally.[260] Three principles have been offered to facilitate the just application of the general rules of negligence to premises liability cases.[261] First, the circumstances

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[254]Hammond v. Allegretti, 311 N.E.2d 821, 826 (Ind. 1974).

[255]In a concurring opinion in Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 107 (D.C. Cir. 1972), Judge Leventhal advocated that the common-law system be abolished only with regard to entrants upon the property of a business establishment. A primary rationale behind this approach is that business establishments can distribute the burden of liability through insurance or self insurance by spreading the loss among its customers. For a criticism of Judge Leventhal's approach, see Comment, Smith v. Arbaugh's Restaurant, Inc., *and the Invitee-Licensee-Trespasser Distinction*, 121 U. PA. L. REV. 378 (1972).

[256]*See* Comment, *supra* note 255, at 384-85; 25 VAND. L. REV. 623, 637 (1972).

[257]*See* Comment, *supra* note 255, at 385.

[258]*See* 25 VAND. L. REV. 623, 638 (1972).

[259]*See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971); Pickard v. City of Honolulu, 452 P.2d 445 (Hawaii 1969).

[260]The jury instructions suggested by the court in Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 106 (D.C. Cir. 1972), were instructions previously used to define the duty of care owed to invitees.

[261]*See* Comment, *supra* note 255, at 385-87.

of entry will generally bear a relation to the foreseeability of an entrant's presence. This should be balanced with the foreseeable risk of harm and the burden of taking precautions in determining whether the possessor exercised reasonable care.[262] Secondly, what is a reasonable burden upon one possessor might be an unreasonable burden upon another, and the law of negligence should allocate burdens fairly and equitably. Thirdly, the possessor may continue to assume that trespassers and licensees who should realize that their presence is unknown and unforseeable will exercise reasonable care for their own safety. By adhereing to these principles, courts will impose liability only when the possessor acted unreasonably, and the interest in human safety will be considered as well as the interest in the free and open use of one's land.

VI. Conclusion

The common-law classification system enjoys continued formal acceptance by Indiana courts. On the other hand, the mores of modern society demand that current policy factors receive greater consideration than is possible by rigidly adhering to the common law rules. The result is a gulf between judicial thought and judicial expression.[263] The courts have created exceptions, resorted to fictions, and misapplied existing doctrines to mitigate the harsh operation of the classification system. The results achieved by this process fairly approximate the results that would be achieved by holding the possessor to a standard of due care. However, the continued use of fictions requires that inquiries be made that have little relevance to the vital policy considerations of the day, and on occasion arbitrary and harsh results are attained. The misapplication of existing doctrine and the creation of exceptions thereto breeds confusion and complexity in the law

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[262]*See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 105-06 (D.C. Cir. 1972).

[263]Professor Eldredge has aptly depicted the effect of the gulf between thought and expression:

> [A] developing law of negligence has battered continually at the gates guarding the immunities of possessors of land. Compromise after compromise has been effected between the social value of human life and the social value of the unrestricted use of land. The last chapter is not yet written. . . . In studying the cases the trouble too frequently is in the difference between what the courts say and what they decide. Too often the terminology is still in eighteenth or nineteenth century phrasing.

Eldredge, *Tort Liability to Trespassers*, 12 Temp. L.Q. 32, 34 (1937).

without accomplishing a workable approach to determining the duty of care owed by the possessor. A more rational method of imposing or denying liability in the area of premises liability is needed in Indana law. The most rational method at the disposal of the courts is the application of the general rules of negligence.[264] There are no policy reasons in existence today which justify the exemption of the landowner from the standard of care demanded of enterprises generally.[265]

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[264]If Indiana courts are reluctant to make such a doctrinal departure from existing law, a second alternative exists. The *Restatement of Torts* provides a coherent body of law which approximates the standard of ordinary care in determining the duty owed by the possessor. *See* RESTATEMENT (SECOND) OF TORTS §§ 328E-62 (1965). However, the adoption of the *Restatement* approach would tend to perpetuate rather than eliminate adherence to the ancient terminology of the common law system. On this basis, the *Restatement* approach has been justly criticized. *See* Hughes, *Duties to Trespassers*, 68 YALE L.J. 633, 648-49 (1959).

[265]*See* James, *supra* note 27, at 153.

NEGLECTED CHILDREN AND THEIR PARENTS IN INDIANA

I. Introduction

In the landmark decision of *In re Gault*,[1] the United States Supreme Court held that "delinquent" children were no longer to be excluded from the constitutional scheme of due process. *Gault* required that certain constitutional rights[2] be accorded all juveniles and their parents in the adjudicatory phase[3] of delinquency proceedings whenever the possible outcome was commitment to a state institution. The mandates of *Gault* have received widespread application to delinquency proceedings in Indiana.[4] In addition to delinquents, the juvenile court must also deal with children who are, in Justice Harlan's words, "not in any sense guilty of criminal misconduct," but are merely "in some manner distressed."[5] By Indiana statute these distressed children are classified as either "dependent"[6] or "neglected."[7] The distinction

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[1]387 U.S. 1 (1967).

[2]*Gault* provided that the child and his parents were constitutionally entitled to (1) a written notice of the hearing and of the charges sufficiently in advance to prepare, (2) representation by counsel, including appointment of counsel, if necessary, (3) the privilege against self-incrimination, and (4) the right to confrontation and cross-examination of witnesses. *Id.* at 31-59.

[3]The Court adopted a tripartite scheme for consideration of constitutional rights in juvenile matters: prejudicial, adjudicative, and post-adjudicative or dispositional. The holding in *Gault* is limited to the adjudicative phase of proceedings. *Id.* at 13.

[4]*Gault* was originally cited in Summers v. State, 248 Ind. 551, 230 N.E.2d 320 (1967) for the proposition that juveniles must be afforded due process. However, *Summers* involved a waiver of juvenile court jurisdiction. Therefore, primary reliance as in *Gault* was upon the factually analogous case of Kent v. United States, 383 U.S. 541 (1966). Since *Summers*, *Gault* has frequently been relied on by Indiana courts. *See* State *ex rel.* McClintock v. Hamilton Cir. Ct., 249 Ind. 337, 232 N.E.2d 356 (1968), which overruled denial of a motion for change of venue in a judicial matter when summons was issued one day and trial set for the next, since the cause was not at issue and a plea had not been entered; Haskett v. State, 255 Ind. 206, 263 N.E.2d 529 (1970), which drew an analogy between commitment under juvenile code and involuntary commitment under criminal sexual psychopath statute; Lewis v. State, 255 Ind. 436, 288 N.E.2d 138 (1972), which held that a juvenile confession was inadmissible when parents are not advised of right to have counsel before and during questioning; Bridges v. State, 299 N.E.2d 616 (Ind. 1973), which held that juveniles are entitled to counsel at every stage of proceedings.

[5]387 U.S. at 76 (Harlan, J., concurring).

[6]A dependent child is a boy under the age of sixteen or a girl under the age of seventeen who is dependent upon the public for support, is destitute, or is homeless or abandoned. Ind. Code § 31-5-5-1 (1971).

[7]A neglected child is a boy under the age of sixteen or a girl under the

between these terms is that a finding of dependency carries no implication of parental fault, while a finding of neglect involves some parental culpability.[8] Any discussion of dependent children[9] is beyond the scope of this Note. Instead, this Note focuses upon the rights of the parent and the child in civil neglect proceedings.

II. Parental Rights

A. *Substantive Basis*

In 1923, while striking down a statute which forbade the teaching of German to children, the Supreme Court expanded the

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age of seventeen who (1) does not have proper parental care or guardianship, (2) habitually begs or receives alms, (3) is found living in any house of ill fame, or with any vicious or disreputable person, (4) is employed in any saloon, (5) whose home, by reason of neglect, cruelty or depravity on the part of its parent or parents, guardian or other person in whose care it may be, is an unfit place for such child, or (6) whose environment is such as to warrant the state, in the interest of the child, in assuming its guardianship. *Id.* § 31-5-5-2. The definition under the criminal code is quite different:

> Neglect of a child shall consist in any of the following acts, by anyone having the custody or control of the child: (a) willfully failing to provide proper and sufficient food, clothing, maintenance, regular school education as required by law, medical attendance or surgical treatment, and a clean and proper home, or (b) failure to do or permit to be done any act necessary for the child's physical or moral well-being: Provided, however, that no provision of this act shall be construed to mean that a child is neglected or lacks proper parental care whose parent, guardian or custodian in good faith selects and depends upon spiritual means or prayer for the treatment or cure of disease or remedial care of such child.

Id. § 35-14-1-2.

[8]Hence a parent charged with cruelty or neglect of children under section 35-14-1-2 or contributing to neglect under section 31-5-5-4, and who is subsequently acquitted or has his case dismissed, may still be deprived of his child in a civil neglect proceeding. *Id.* § 35-14-1-6.

[9]A finding of dependency is primarily administrative, not adjudicative, in nature. *See* Becker, *Due Process and Child Protective Proceedings: State Intervention in Family Relations on Behalf of Neglected Children*, 2 Cum.-Sam. L. Rev. 247, 265 (1971). In Indiana the statutory definition of neglected child embodies behavior which conceptually one would expect to find in the definition of dependent child. *See* notes 6, 7 *supra*. *See also* Note, *Dependency and Neglect: Indiana's Definitional Confusion*, 45 Ind. L.J. 606 (1970). One result of this confusion has often been the filing of a neglect petition when the proper and more expeditious procedure would have been to file for dependency based on an information by the parents of the needy child. Ind. Code § 31-5-7-8 (1971).

meaning of liberty under the fourteenth amendment.[10] Mr. Justice McReynolds stated that liberty "denotes not merely freedom from bodily restraint but also the right of the individual . . . to establish a home and bring up children . . . ."[11] From a parental viewpoint "bringing up children" encompasses the legal right to custody of the child and the concommitant enjoyment of the child's love, affection, and earnings.[12] Regardless of whether the right to raise one's child is fully cognizable as a substantive right,[13] it is not an absolute right.[14] The parental right to raise a child may be denied even before the child is *in esse*.[15]

B. *Effect of Neglect Proceedings on Parental Rights*

A direct outcome of neglect proceedings is the abridgement of the parents' rights to raise their children. By statute,[16] Indiana

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[10]Meyer v. Nebraska, 262 U.S. 390 (1923).

[11]*Id.* at 399. This position was affirmed in Pierce v. Society of Sisters, 268 U.S. 510 (1925). Both *Meyer* and *Pierce* were cited with approval in Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring), which struck down a birth-control statute.

[12]Ekendahl v. Svolos, 388 Ill. 412, 58 N.E.2d 585 (1945).

[13]*See* Note, *Child Neglect: Due Process for the Parent*, 70 COLUM. L. REV. 465, 471 (1970).

[14]Ekendahl v. Svolos, 388 Ill. 412, 58 N.E.2d 585 (1945).

[15]If the state in acting for the public good may deny a class of citizens the right to bear children, it may also deny the right to bring up children born to citizens of another class. *See In re* Cavitt, 182 Neb. 712, 714, 157 N.W.2d 171, 175 (1968), which upheld sterilization of mental defectives. *See generally* Kindregan, *State Power Over Human Fertility and Individual Liberty*, 23 HASTINGS L.J. 1401, 1405-08 (1972).

[16]If the child is found to come within the definition of a neglected child, the court may:

> (1) Place the child on probation or under supervision in his own home or in the custody of a relative or other fit person, upon such terms as the court may determine;
>
> (2) Commit the child to any suitable public institution or agency, which shall include, but is not limited to, the state institutions for the feeble-minded, epileptic, insane, or any other hospital or institution for the mentally ill, or commit the child to a suitable private institution or agency incorporated or organized under the laws of the state, and authorized to care for children or to place them in suitable approved homes;
>
> (3) The court may make such child a ward of the court, a ward of the department of public welfare of the county, or a ward of any licensed child placing agency in the state willing to receive such wardship;

provides the juvenile court with a broad range of remedies from which the court may fashion relief for a neglected child. The court retains the power to modify the adopted remedy[17] until the child reaches his legal majority.[18] Thus, the duration of the loss of the parents' right to raise their children is dependent upon the particular remedy selected by the court.

There is unlimited potential for judicial creativity in shaping a remedy designed to promote the best interests of the child and his parents, as evidenced by the broad statutory purpose of the Juvenile Court Act[19] and the inherent equitable powers of the court.[20] Unfortunately, however, the court rarely fashions family-centered relief, as distinguished from child-centered relief. The competing demand which the delinquency caseload places upon judicial time frequently dictates that the court forego a creative role in the handling of neglected children. Hence, the child-centered remedy generally chosen by the court is the creation of a wardship with the county department of public welfare named

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(4) May take cause under advisement or postpone findings and judgement for a period not to exceed two [2] years unless sooner requested by the party proceeded against in which event not to exceed ninety [90] days.

(6) Make such further disposition as may be deemed to be to the best interests of the child, except as herein otherwise provided.

IND. CODE § 31-5-7-15 (1971).

[17] *Id.* § 31-5-7-17.

[18] *Id.* § 31-5-5-3, *as amended*, P. L. 296, § 8, p. 1577 (1973). Wardship may cease before the child's eighteenth birthday "upon proper showing made." *See* Note, *The Custody Question and Child-Neglect Rehearings*, 35 U. CHI. L. REV. 478 (1968).

[19] IND. CODE § 31-5-7-1 (1971). The purpose of the Juvenile Court Act is:

to secure for each child within its provisions such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interests of the state; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents.

The principle is hereby recognized that children under the jurisdiction of the court are subject to the discipline and entitled to the protection of the state, which may intervene to safeguard them from nelgect or injury and to enforce the legal obligations due to them and from them.

Id.

[20] McCord v. Ochiltree, 8 Blackf. 15 (Ind. 1846).

as a guardian.[21] The result of this arrangement is that any parental rights remaining[22] after an adjudication of neglect are dependent upon the objectivity of the welfare department caseworker. When the neglect proceeding has been instituted by a caseworker,[23] it is unlikely that the caseworker will desire to assist the parents in seeking an early termination of the wardship. This is particularly true when criminal neglect[24] charges have been dismissed,[25] for the caseworker may then utilize the wardship as a vehicle for the application of retributive justice to the neglecting parents.[26] Thus, a measure intended by the court to result only in a temporary deprivation of the parental right to raise children may, as applied, greatly prolong the deprivation of that right.

In addition to the loss of the parental right to bring up children, neglect proceedings may adversely affect other interests of the parents. For example, criminal sanctions may be imposed.[27] Similarly, when wardship is established, parents may be deprived of property in the form of a support order.[28]

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[21]*See* note 16 *supra.*

[22]A neglect proceeding may also result in termination of parental rights. *Compare* IND. CODE § 31-3-1-7 (1971) *with id.* § 31-5-7-15(4). The child may then be adopted without notice to the parents. *See* Hogg v. Peterson, 245 Ind. 515, 198 N.E.2d 767 (1964). *Hogg* held that parental consent in adoption proceedings was not required, nor was it necessary to give the parents notice of the adoption proceeding when the parents had been deprived of parental rights in a wardship proceeding of which they had notice.

[23]IND. CODE § 31-5-7-8 (1971).

[24]*See, e.g., id.* §§ 31-5-5-4, 35-14-1-2.

[25]In the child abuse area of neglect, witnesses are rare, and the child may be too young to speak or he may fear his parents' wrath. Without proof contradicting the parents' explanations, criminal charges are usually not even filed. *See* Keating, *Patrolman Has Had Easier Jobs*, The Indianapolis Star, Oct. 10, 1973, at 15, col. 1; Keating, *Neglectful Parents Sentenced*, The Indianapolis Star, Nov. 7, 1973, at 13, col. 1.

[26]An example of manipulation of the ancillary parental relationship created by the wardship may be found in caseworker control of visitation rights. Caseworker discretion in setting the frequency and location of visits is theoretically subject to review. IND. CODE § 31-5-7-17 (1971). But even if a parent succeeds in obtaining an order allowing a certain number of visits per month, the caseworker may, under the protective rhetoric of "best interests of the child," successively remove the child to foster homes more remote from the parents' home. Thus, frequent visits are made inconvenient, if not impossible.

[27]*See, e.g., id.* §§ 31-5-5-4, 35-14-1-2.

[28]*Id.* § 31-5-7-20.

III. Rights of Child

A. *Substantive Basis*

The right of parents to bring up children[29] necessarily implies the correlative right of children to be raised by their parents.[30] The concept of "being raised" is divisible into two distinct components. The first component is the provision of survival needs, including food, shelter, and clothing. The second component is the provision of socialization needs, encompassing moral support, guidance, love, protection, and education. A consideration of these elements suggests that each child must receive some minimal level of fulfillment of each of these needs. The law of neglect, however, does not reach the suggested conclusion. Neglect, as presently defined,[31] deals only with the parents' failure to provide survival needs.

State intervention to provide survival needs may be direct, as in the case of neglect proceedings, or indirect, as through the provision of welfare subsidies[32] to the family. The latter approach is advantageous to the child in that he is able to enjoy both components of the right to be raised. In the event that a parent fails to properly provide for the child, even after indirect state subsidization, the state, via neglect proceedings, can directly assume the role of provider of survival needs.

When the state directly intervenes, the effect upon the right of the child to be raised is a denial of the child's right to be socialized by his parents.[33] Under a "right to treatment"[34] theory,

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[29]Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *Meyer* struck down a state statute which forbade the teaching of German to school children.

[30]*See* Weiss, *The Emerging Rights of Minors*, 4 U. Tol. L. Rev. 25, 28-29 (1972).

[31]*See* note 7 *supra*.

[32]When subsidization occurs, for example in aid to families of dependent children (AFDC), the state's interest in guaranteeing that the survival needs of the child are met is paramount to the parents' right of privacy. Wyman v. James, 400 U.S. 309 (1971). While subsidization needs may not preclude the fulfillment of the child's socialization needs by his natural parent, the requisite home visits necessary to continued subsidization often result in the filing of a neglect petition. *See* Dembitz, *Welfare Home Visits: Child Versus Parent*, 57 A.B.A.J. 871 (1971). *See also* S. Katz, When Parents Fail: The Law's Response to Family Breakdown 24 (1971).

[33]This right is generally recognized as a paramount consideration in custody proceedings. The following statement by Judge Martin is typical:

> Of the many ties that bind humanity, that which unites the parent and the child is the earliest and the most hallowed . . . and in all civilized countries it is regarded as sacred.

Duckworth v. Duckworth, 203 Ind. 276, 277-78, 179 N.E. 773, 774-75 (1932).

[34]The right to treatment theory is based on the premise that the purpose

when the state takes custody of the child in a neglect proceeding, it must not only provide for the child's survival needs, but also for his socialization needs. If the state attempts to socialize the child, particularly when the child is a member of a cultural minority, the socialization received is apt to be foreign and unfamiliar to the child and unacceptable to the natural parents.[35] Hence, judicial treatment of neglected children through the use of extended wardships may counter-socialize the child, and thereby negatively affect family cohesion.

B. *Standards Governing Children's Rights in Neglect Proceedings*

In determining the rights of children in neglect proceedings, the juvenile court is guided by two familiar principles—the best interest of the child and the *parens patriae* power of the state.[36] The "best interest of the child" test as applied in neglect proceedings[37] originated in the common law. For example, in a 1774 English case, a mother sought custody of her six-year old daughter.[38] The mother alleged that the father was bankrupt and that the child was unlikely to receive a proper education.[39] In deciding the custody issue, Lord Mansfield stated that when "the parties are disagreed the court will do what shall appear best for the child."[40] The "best interest" test as it developed was merely an exercise of the general equitable powers of the court.[41] Accordingly, this test has been applied in habeas corpus actions,[42] divorce

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of a civil commitment is therapeutic rather than reprehensive. Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966). *See* Weiss, *The Emerging Rights of Minors*, 4 U. TOL. L. REV. 25, 36 (1972); *cf.* Note, *A Right to Treatment for Juveniles?*, 1973 WASH. U.L.Q. 157. As applied to neglect proceedings, the right to treatment means the right to guidance in growing up properly, *i.e.*, the right to socialization.

[35]Wizner, *The Child and the State: Adversaries in the Juvenile Justice System*, 4 COLUM. HUMAN RIGHTS L. REV. 389, 394 (1972).

[36]Originally state intervention under the doctrine of *parens patriae* arose only upon the death of a tenant *in capite* for the protection of the child's inheritance. *See* Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894, 895-96 (1966).

[37]*See, e.g.*, IND. CODE §§ 31-5-5-3, 31-5-7-1 (1971).

[38]Blissets Case, 98 Eng. Rep. 899 (Ch. 1774).

[39]*Id.* at 899.

[40]*Id.* at 900. Indiana has followed this common law test. Jones v. Darnall, 103 Ind. 569, 2 N.E. 229 (1885).

[41]Rex v. Delaval, 97 Eng. Rep. 913 (Ch. 1763).

[42]Jones v. Darnall, 103 Ind. 569, 2 N.E. 229 (1885).

proceedings,[43] changes of guardianship,[44] and even in a case involving charges of conspiracy to keep a prostitute.[45] Not surprisingly, the "best interest" test was adopted by the Indiana General Assembly as an integral part of the law of neglect.[46]

Unfortunately for the parents and the child the "best interest" test is succeptible to misapplication in neglect proceedings.[47] In a neglect action, the court must make three determinations. First, the court must find the facts. Secondly, the court must decide whether the facts adduced constitute neglect. Finally, if the facts prove neglect, the court must decide whether the child may remain in the custody of his parents.[48] Only after the second question has been answered affirmatively is the application of the "best interest" test proper. In this situation the court is merely inquiring whether the interests of the child require that he be removed from the custody of his parents. If, however, the court applies the test to determine whether the facts constitute neglect, the potential harm is obvious—the court by using the test subjectively may erroneously conclude that the child might be better cared for by the state, although under an objective standard insufficient harm exists to support a finding of neglect.[49] While the "best interest" test is applicable in Indiana only after a finding of neglect has been made,[50] judicial confusion exists because of the vague definition of neglect.[51]

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[43]Wilkinson v. Deming, 80 Ill. 342 (1880).

[44]Bryan v. Lyon, 104 Ind. 227, 3 N.E. 880 (1885).

[45]Rex v. Delaval, 97 Eng. Rep. 913 (Ch. 1763).

[46]*See* note 19 *supra*.

[47]The failure to ascertain the proper point for application of the best interest test in neglect proceedings has confused others as well as the court. *See* Young, *The Problem of Neglect—Legal Aspects*, 4 J. FAM. L. 29, 45 (1964).

[48]*See* Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 699 (1966).

[49]*See* Note, *Child Neglect: Due Process for the Parent*, 70 COLUM. L. REV. 465, 472 (1970).

[50]Although this particular issue has not yet been raised in Indiana, substantial precedent exists to suggest the holding. Thus in 1963, Judge Hunter in the case of *In re* Bryant's Adoption, 134 Ind. App. 480, 493-94, 189 N.E.2d 593, 600 (1963) stated:

> [T]he "child's best interest rule" . . . is never an issue for judicial determination in an adversary adoption proceeding until the ultimate fact of "abandonment or desertion" or "failure to support" has first been established by clear, cogent and indubitable evidence.

[51]The Indiana Appellate Court has recognized the vagueness of the statutory definition of neglect. In commenting on the definition of neglected

The second principle obtaining in neglect proceedings is the power of the state as *parens patriae* to exercise a protective interest in the child's welfare.[52] The origins of the *parens patriae* power, like the "best interest" test, are traceable to common law. Sixty years before the adoption of the first neglect statute in Indiana, the supreme court recognized the *parens patriae* power as a distinct basis of equitable jurisdiction allowing the state to "superintend infants, idiots, lunatics and certain charities."[53] With the adoption of the neglect legislation, the *parens patriae* power merged with the philosophy of the Juvenile Court Act to vest enormous discretionary power in the juvenile court. The philosophy of the Juvenile Court Act, summarized in *Herber v. Drake*,[54] is not to punish the child, but rather to reform, discipline, and educate him, and to provide him with a suitable guardian.[55] The right of the state, as *parens patriae* to deny procedural rights to children under the prevailing philosophy of the Juvenile Court Act was diminished in *Gault*.[56] However, the vitality of the *parens patriae* doctrine as a rationale for a state interdiction of family relations via neglect proceedings still obtains.[57] As a result, judicial watchfulness must be maintained so that the state's interest does not preclude a careful consideration of the rights of children and their parents.

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child which allowed a finding of neglect to be made when the child's environment was undesirable, the court said:

> "Environment" is a word of broad significance. Just what the legislature intended by this last clause we do not know. We assume, however, that it did not intend thereby to confer unlimited authority on the court to determine arbitrarily and generally what sort of environment will justify the state in assuming control of infants. It is not the province of the courts to determine generally what conditions or exigencies will warrant the state in seizing the children of its citizens. To determine and declare the general policy of the state on this subject is a legislative function, which cannot be delegated to the courts.

Orr v. State, 70 Ind. App. 242, 245, 124 N.E. 470, 473 (1919). *See generally* Note, *Juvenile Statutes and Noncriminal Delinquents: Applying the Void-For-Vagueness Doctrine*, 4 SETON HALL L. REV. 184 (1972).

[52] *See* note 36 *supra*.

[53] McCord v. Ochiltree, 8 Blackf. 15 (Ind. 1846).

[54] 68 Ind. App. 448, 118 N.E. 864 (1918).

[55] *Id.* at 451, 118 N.E. at 886.

[56] 387 U.S. 1, 16 (1967).

[57] *In re* Gault, 387 U.S. 1, 76 (1967) (Harlan, J., concurring).

IV. Procedural Rights: Neglect Proceedings in Indiana

A. *Constitutional Parameters*

The preceding discussion implies that both parents and children have substantive rights in neglect proceedings. The sanctity of those rights is dependent upon the proper application of the standard for determining neglect by the juvenile court. Greater precision in legislative definitions may be desirable[58] to provide clearer guidelines for the court. Moreover, if the phrase "substantive rights" is to have meaning in the context of neglect, the parties must be guaranteed the safeguards of procedural due process.[59] These procedures in a neglect proceeding are influenced by the extent to which the parties are "condemned to suffer grievous loss."[60] The possibility of the parents' loss of their child and the child's loss of his parents, even for an indefinite period of time, is undeniably a "grievous loss." In delinquency proceedings, *Gault* held that due process required adequate written notice of the hearing and of the charges, representation by counsel, the option to invoke the privilege against self-incrimination, and the right to confrontation and cross-examination of witnesses.[61] While providing some elements of procedural due process in neglect proceedings,[62] the Indiana General Assembly has not made the procedure coextensive with *Gault*.[63]

B. *Indiana Procedure*

The probation officer or the county department of public welfare institutes a neglect proceeding by filing a petition with the juvenile court.[64] This petition must allege facts constituting neglect.[65] Based on this petition, the court then issues a summons

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[58]*See* Young, *The Problem of Neglect—The Legal Aspects*, 4 J. Fam. Law 29 (1964).

[59]This proposition is basic. In the often quoted words of Judge Eschweiler, "if a man's money shall not be legally taken away from him save by due process of law, much less shall his child." Lacher v. Venus, 177 Wis. 588, 570, 188 N.W. 613, 617 (1922).

[60]Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1952) (Frankfurter, J., concurring).

[61]*In re* Gault, 387 U.S. 1 (1967).

[62]*See, e.g.*, Ind. Code § 31-5-7-7 to -15 (1971).

[63]*See* note 2 *supra*.

[64]Ind. Code § 31-5-7-8 (1971).

[65]*Id.*

which contains a summary of the petition and orders the person having custody of the child to appear.[66] Personal service of the petition is required[67] unless the court finds it impracticable.[68] Service given twenty-four hours before the hearing is effective to confer jurisdiction.[69] Significantly, it is doubtful that twenty-four hour notice comports with the *Gault* directive that notice be given "sufficiently in advance of scheduled court proceedings that reasonable opportunity to prepare will be afforded."[70]

A deviation from the foregoing procedure is permitted when the parents' conduct compels immediate state action to protect the child.[71] In this situation, the only notice given to the parent is that which can be inferred from the removal of the child.[72] Clearly, the use of interlocutory orders of wardship in the "battered child"[73] situation is a necessary and desirable exercise of the state's *parens patriae* power. The parents' interest in avoiding the loss of his child is outweighed by the government's and

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[66]*Id.* § 31-5-7-9. If the person having custody is not the child's parent or guardian, the parent or guardian must also be given notice of the hearing.

[67]*Id.* § 31-5-7-10.

[68]*Id.*

[69]*Id.* § 31-5-7-10; *In re* Johnson, 136 Ind. App. 528, 529, 202 N.E.2d 895, 896 (1964). *Johnson* reversed a judgment of delinquency and order of commitment entered by the court below when the proceeding took place without issuance or service of summons.

[70]*In re* Gault, 387 U.S. 1, 33 (1967). *Gault* required that notice be given to the child and his parents. Indiana does not require service upon an infant under the age of fourteen. IND. R. TR. P. 4.2(A).

[71]IND. CODE §§ 31-5-7-9, 31-5-7-12 (1971).

[72]*See id.* § 31-5-7-12 (1971); *cf., id.* § 3-5-7-9. Even if a petition has been filed, a common practice in emergency wardship cases is to issue the summons without a copy of the petition. If no emergency exists, welfare workers and juvenlie court judges should note the warning of Judge Hunter's concurring opinion in Johnson v. State, 136 Ind. App. 528, 546, 202 N.E.2d 895, 904 (1964):

> . . . no matter how strongly the judge or the public may emotionally be impelled, no matter how much the ultimate judgment may be justified upon evidence prematurely and illegally obtained, no matter how impatient the judge may be with the frustration of momentary delays occasioned by compliance with orderly judicial process under the law, our courts at all levels must declare clearly that all of the protective safeguards for their "welfare and best interests" as well as those of "the state" shall be adhered to strictly.

[73]*See generally* Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 698-99 (1966).

child's interest in summary action.[74] However, when immediacy of great bodily harm is not present, the utilization of interlocutory orders of wardship infringes upon the parties' constitutional right to notice and hearing.[75] Notwithstanding constitutional rights, caseworkers greatly appreciate the summary nature of obtaining wardship based on interlocutory orders and use this device frequently.[76] An order for emergency wardship enables the caseworker to rescue[77] the child from his present environment,[78] gain temporary custody of the child, and place the burden of requesting a hearing on the child or his parents.[79] Since a wardship based on an interlocutory order is not appealable in Indiana,[80] and since the county department of public welfare has little to gain from an adversary neglect proceeding, inaction by the department in arranging hearings on neglect petitions is not infrequent.[81] If the purpose of the Juvenile Court Act [82] is to be meaningfully served, and the dignity of the court is to be maintained, indiscriminate use of *ex parte* procedures can not be sanctioned.

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[74]The balancing approach is suggested by Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

[75]*See* Fuentes v. Shevin, 407 U.S. 67 (1972).

[76]One index of the frequency of use of interlocutory orders is the number of pending neglect cases. *See* Crary, *A Juvenile Court's Responsibility to Neglected and Dependent Children*, 38 IOWA L. REV. 79 (1952).

[77]For a discussion of the "rescue" phenomena, see Burt, *Forcing Protection on Children and Their Parents: The Impact of* Wyman v. James, 69 MICH. L. REV. 1259, 1278-79 (1971).

[78]Removing a child from his present environment involves a judgment as to whether that environment is so unhealthy or immoral as to necessitate immediate removal. The decision to issue an interlocutory order lies, of course, with the court. However, the basis for issuance of the order is the report given to the court by the caseworker or police officer. Since the caseworker and police officer are invariably middle-class, and neglectful parents are frequently in a different socio-economic group, the removal of the child is based on a middle-class value judgment. In other words, the brutality, cleanliness, and morality of the parents' are all measured by middle-class standards, although the parents themselves may have matured in an atmosphere similar to the one now being condemned by the state. *See* Weiss, *The Emerging Right of Minors*, 4 U. TOL. L. REV. 25, 37 (1972).

[79]IND. CODE § 31-5-7-12 (1971).

[80]Appeals can only be taken from final judgments and an interlocutory order is not a final judgment. Vinson v. Rector, 130 Ind. App. 606, 167 N.E.2d 601 (1960).

[81]*See* note 76 *supra.*

[82]*See* note 19 *supra.*

C. *Right to Counsel*

While the legislatures of some states[83] have followed the *Gault* directive in granting the child[84] the right to counsel in neglect proceedings, Indiana has not. A possible basis for Indiana's failure to extend the right to counsel to neglect proceedings lies in the fact that *Gault* involved criminal charges while neglect proceedings are "civil."[85] Yet, in recognizing the necessity of counsel for fair treatment of juveniles in delinquency proceedings, the Supreme Court in *Gault* deemphasized the nature or title of the proceeding.[86] The primary concern of the Court was the possible outcome of the proceeding.[87] Thus, the Court reasoned that when the issue is whether the child will be found to be delinquent and subjected to the loss of his liberty for years, the juvenile proceeding is comparable in seriousness to a felony prosecution.[88] Consequently, the Court held that the juvenile was entitled to counsel, who would be appointed if necessary.[89]

The importance of counsel's presence in neglect proceedings is forcefully illustrated by the findings of a study conducted in New York[90] When parents were not provided counsel in neglect proceedings, only 7.9 per cent of the neglect petitions were dismissed; of those remaining, seventy-five per cent resulted in an ultimate finding of neglect.[91] When counsel was present at the

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[83]*See, e.g.*, N.Y. FAMILY COURT ACT § 249 (McKinney 1963); ILL. REV. STAT. ch. 37, § 704-5 (1971).

[84]As noted above, although the focus of juvenile proceedings is upon the child, a finding of neglect affects the rights of the parents or guardian of the child. It is thus arguable that parents should be represented in neglect proceedings. *See* Note, *Indigent Parents in Juvenile Proceedings: The Right to Appointed Counsel*, 1969 L. & SOC. ORD. 467. For the proposition that the interests of juveniles may in some cases demand representation by counsel other than that of their parents, see Wizner, *The Child and the State: Adversaries in the Juvenile Justice System*, 4 COLUM. HUMAN RIGHTS L. REV. 389 (1972).

[85]Board of Children's Guardians v. Gioscio, 210 Ind. 581, 4 N.E.2d 199 (1936).

[86]387 U.S. 1, 49-50 (1967).

[87]*Id.* at 36.

[88]*Id.*

[89]*Id.* at 41.

[90]Note, *Representation in Child-Neglect Cases: Are Parents Neglected?*, 4 COLUM. J.L. & SOC. PROB. 230, 236-38 (1968).

[91]*Id.*

hearing, however, twenty-five per cent of the petitions were dismissed and only 62.5 per cent resulted in a determination of neglect.[92]

The analogy to *Gault* is appealing in neglect actions and has frequently been urged.[93] It is convenient to phrase the issue in neglect proceedings according to the *Gault* formula, *i.e.*, as a proceeding in which the child may be found to be neglected and thus subjected to the loss of his liberty. Whether the Indiana courts are likely to adopt the logic of *Gault* as a vehicle for creating a right to counsel in neglect proceedings may best be determined after an examination of several cases in which *Gault* has been before the Indiana courts.

In *Haskett v. State,*[94] the Indiana Supreme Court found the *Gault* reasoning persuasive and provided for the privilege against self-incrimination in a criminal sexual psycopath hearing.[95] A possible outcome of the hearing was an involuntary civil commitment.[96] Significantly, the court had earlier rejected the reasoning of *Gault* in *Bible v. State,*[97] and denied juveniles the right to a trial by jury in delinquency proceedings.[98] In arriving at the decision in *Bible,* the court relied upon narrow language in *Gault*[99] and concluded that no wholesale incorporation of the rights of adults in criminal actions into juvenile actions was thereby intended.[100] Despite the holding in *Bible,*[101] the court adopted a new

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[92]*Id.*

[93]*See* Note, *Child Neglect: Due Process for the Parent,* 70 COLUM. L. REV. 465, 475-79 (1970). *See generally* Burt, *Forcing Protection on Children and Their Parents: The Impact of* Wyman v. James, 69 MICH. L. REV. 1259, 1285 (1971).

[94]255 Ind. 206, 263 N.E.2d 529 (1970).

[95]*Id.*

[96]*Id.* at 210-11, 263 N.E.2d at 532.

[97]253 Ind. 373, 254 N.E.2d 319 (1970).

[98]*Id.*

[99]387 U.S. 1, 13 (1967). The language quoted from the *Gault* opinion was a statement that the Court would not consider the impact of constitutional provisions upon the totality of the relationship of the juvenile and the state. Within the context of this statement, the Supreme Court seems merely to have been limiting its decision in *Gault* to the facts of the case, and not commenting on the extension of the Bill of Rights to any juvenile proceeding.

[100]Bible v. State, 253 Ind. 373, 381, 254 N.E.2d 319, 326 (1970).

[101]*See* Note, *Right to Jury Trial: Indiana's Misapplication of Due Process Standards in Delinquency Hearings,* 45 IND. L.J. 579 (1970).

standard[102] for determining the scope of procedural rights necessary for fair treatment of juveniles in a given proceeding. In applying this standard, the court balanced the elements of procedural protection necessary to achieve justice for the child against the impairment, resulting from the exercise of these safeguards, of the "distinctive values"[103] of the juvenile court.[104] With the *Gault* rights[105] fully applicable in delinquency proceedings, the court in *Bible* concluded that that the benefit accruing to the juvenile through the additional element of a jury trial did not outweigh the detrimental restriction of the *parens patriae* power of the court to deal less formally with the child.[106] Hence, there is no right to a jury trial in delinquency proceedings.[107]

Applying this standard to neglect proceedings, the balance tips in favor of extending the right of counsel to juveniles. Certainly, the child deserves protection by the state from abusive parents. However, the right of the child to be raised by his family demands protection from unwarranted state interference.[108] Moreover, justice requires an assurance that the state, in removing the child from his natural parents, will not allow him to become a commodity in the foster care market.[109] It is submitted that both of these functions may best be satisfied by the appointment of counsel for the child.[110] The cost to the court in terms of infringement upon the unique powers of the juvenile court appears to be minimal. On the one hand, the presence of counsel would require the state to prove, by a preponderance of the evidence,[111] facts constituting neglect before interfering with the rights of the child. On the

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[102]The standard adopted was suggested by the Commission on Law Enforcement and Administration of Justice in its *Task Force Report, Juvenile Delinquency and Youth Crime* (1967).

[103]"Distinctive values" is the phrase chosen by the court to embody the *parens patriae* concept of dealing with juveniles. *See* note 36 *supra* & accompanying text.

[104]Bible v. State, 253 Ind. 373, 390, 254 N.E.2d 319, 327 (1970).

[105]*See* note 2 *supra.*

[106]Bible v. State, 253 Ind. 373, 390, 254 N.E.2d 319, 327 (1970).

[107]*Id.*

[108]*See* note 30 *supra* & accompanying text.

[109]*See* Dandridge v. Williams, 397 U.S. 471, 477 (1970).

[110]The appointment of counsel for the parents may in some cases be necessary. *See* note 93 *supra.*

[111]*Cf. In re* Winship, 397 U.S. 358 (1970).

other hand, the presence of counsel would provide additional direction to the court in effecting a disposition of the neglected child. Indeed, the presence of counsel in neglect proceedings would, in most cases, increase the likelihood of the juvenile court fulfilling the purposes for which it was created.

V. Conclusion

In focusing upon the immediate welfare of the child, the juvenile court in neglect proceedings has often overlooked the rights of both the parents and the child. The right of the parents to bring up children and the right of the children to have a family, fundamental propositions in other areas of the law, have not received adequate consideration in the context of neglect. The power of the state as *parens patriae* to conduct juvenile proceedings loosely and without minimum due process standards has been curtailed in delinquency matters. The fundamental rights at stake in neglect proceedings call for rigid scrutiny of the *parens patriae* power in these proceedings. The right to counsel as a principal check upon that power is one of the necessary accouterments of neglect proceedings. Absent any legislative proviso for counsel, there exists an adequate basis for the judicial creation of the right in Indiana. The best interests of the child must no longer serve as a rhetorical cloud to cover procedural abuse of neglected children and their parents by social agents, the courts, and the legislature of the state. The best interests of the child, the parents, and the state must be fairly and objectively determined in neglect proceedings. To require less is to make a mockery of the lofty purposes of child protection.

Michael S. Fischer

RECENT DEVELOPMENT

CRIMINAL PROCEDURE—SEARCH AND SEIZURE—Investigative stop of automobile held constitutional regardless of quantum of supporting facts necessary to constitute "reasonable" grounds for stop.—*Williams v. State,* 307 N.E.2d 457 (Ind. 1974).

A recent Indiana Supreme Court decision, *Williams v. State,*[1] raises the question what, if any, restraints the fourth amendment places on the power of police to make investigative stops of automobiles when a crime has been committed and the detaining officers position themselves along a potential escape route. At 10:02 p.m. on the date in question, two Indiana State Police officers received information that a motel had been robbed in West Lafayette and that the two Negro suspects, one armed with a sawed-off shotgun, were believed headed northwest. The officers proceeded to an intersection known to be a major link up with Interstate 65, which is the most direct route north to Chicago, and proceeded to observe the traffic. One of the officers believed the driver, and only apparent occupant, of a passing car was a Negro, and therefore this car was followed. In order to obtain a better view, the officers first passed the suspect vehicle and later parked in a service station lot where, under the improved lighting conditions, one of the officers became certain that the driver was a Negro. The suspect vehicle was then pulled over and upon approaching the car, the officers sighted a second man hiding in the back seat. When this second man exited the car, a shotgun was seen on the floor of the car.

The trial court denied the defendants' motions to suppress and ruled that the stop was reasonable and thus any evidence seized from the car was properly admissible at trial. The defendants, who were subsequently adjudged guilty of robbery, petitioned for post conviction relief on the ground of error in the trial court's determination of reasonableness. The Indiana Court of Appeals reversed the trial court.[2] The Indiana Supreme Court granted transfer and in a three-to-two decision reversed the court of

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[1]307 N.E.2d 457 (Ind. 1974).

[2]Williams v. State, 299 N.E.2d 882 (Ind. Ct. App. 1973).

appeals and affirmed the judgment of the trial court. While the court tacitly recognized the proposition that the fourth amendment circumscribes the lawfulness of investigatory stops, its decision raises the question whether such restraints are merely illusory.

In determining that the stop in question was lawful, both the plurality opinion of Chief Justice Arterburn and the concurrence of Justice Hunter[3] concluded that the stop was reasonable within the parameters established for investigative stops in *Terry v. Ohio*.[4] Neither opinion, however, adequately dealt with the thres-

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[3]In concurring, Justice Hunter adopted the dissent of Judge Buchanan of the Court of Appeals. Williams v. State, 299 N.E.2d 882, 888 (Ind. Ct. App. 1973). Judge Buchanan had argued that the stop was reasonable. Judge Sullivan had argued for reversal on the theory that in Indiana a car could not be stopped for less than probable cause to arrest. *Id.* at 886. Judge White concurred in the result reached by Judge Sullivan and reasoned that the stop was not reasonable. *Id.* at 888.

[4]392 U.S. 1 (1968). While *Terry* marked the Supreme Court's first sojourn into the area of temporary investigative detentions, the journey was undertaken pursuant to a dirth of commentary which in light of the Court's embracement of the exclusionary rule emphasized the need to square such procedures with the fourth amendment. *See, e.g.*, Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IOWA L. REV. 1093 (1967); Bator & Vorenberg, *Arrest, Detention and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62 (1966); Kuh, *In Field Interrogation: Stop, Question, Detention and Frisk*, 3 CRIM. L. BULL. 597 (1967); LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U.L.Q. 331; Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L.C. & P.S. 393, 406-16 (1963). Given the protean nature of street encounters, it is understandable, or at least not surprising, that the Court did not use *Terry* as a vehicle to map out precise routes which police must follow in forcing street encounters. *See* LaFave, *"Street Encounter" and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 MICH. L. REV. 40, 46 (1968). What is surprising is the Court's subsequent reluctance to face the issues inherent in such stops and to elucidate a more precise set of standards or guidelines by which such myriad encounters can be scrutinized. That is, in retrospect and because of the already well-established practice of forcing *Terry*-type encounters, the legitimizing of such practice was quite foreseeable. *Id.* at 42. Equally understandable is the Court's reluctance to grapple with the matrix of issues which inure in stops of law-abiding citizens when there is no reason to believe that any crime is afoot. *See* Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966). However, the Court's pronouncement that investigative seizures invite substantial interferences with liberty and personal security certainly demonstrated the Court's appreciation of the need for standards by which stops falling within the parameters of *Terry* cases and mere arbitrary stops of law abiding citizens could be judicially evaluated. 392 U.S. at 12. The Court's failure to foray into this interstitial area is not only curious but, more importantly, fraught with a capacity for erosion of fourth amendment values when it is realized that "reasonableness" as a

hold question, implicit in *Terry*,[5] of what facts justified the officers in stopping the suspect vehicle. Thus, the decision leaves unanswered the fundamental issue of how the reasonableness standard of *Terry* is to be applied so as to give meaning to the fourth amendment proscription against arbitrary invasions of privacy.[6]

In *Terry*, the Court explicitly stated that investigative searches were circumscribed by the fourth amendment.[7] Mindful of society's interests in effective and expeditious law enforcement and the limited intrusion occasioned by investigative stops, the Court also ruled that such stops could be legitimately effected on less than probable cause to arrest.[8] Nonetheless, the Court carefully pointed out that fourth amendment values in an investigative setting could only be adequately served by requiring officers to justify their actions by the reproduction of facts which would justify a reasonable man in concluding that the action taken was appropriate.[9] This standard, albeit a watered down progency of

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guiding standard is susceptible of applications which transgress the sacrosanct notion that objectivity is the principle by which all fourth amendment seizures are to be judged. *See* Abrams, *supra*, at 1117. This capacity was noted by Justice Douglas when dissenting in *Terry*:

> There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.

392 U.S. at 39.

[5]392 U.S. at 33-34 (Harlan, J., concurring).

[6]For the proposition that the fourth amendment protects unreasonable invasions of privacy, see Katz v. United States, 389 U.S. 347 (1967).

[7]392 U.S. at 889. *Terry* of course did not deal with the legality of the stop, but focused on the frisk. In Adams v. Williams, 407 U.S. 143 (1972), the Court applied Terry's reasonableness standard to stops and thus for analytical purposes, it is of no real concern that *Terry* in its inception was viewed as possibly limited to frisks when the suspect was believed armed and dangerous. *See The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 176 (1972).

[8]392 U.S. at 905. In subjecting fourth amendment rights to invasions on less than probable cause to arrest, the Court was not writing on an entirely clean slate. The groundwork for its proposition that not all searches and seizures must be tested by probable cause was laid in Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967). In those cases, the Court held that warrants for safety inspections could be obtained for less than the probable cause traditionally required to search. *See* LaFave, *Administrative Searches and the Fourth Amendment: The* Camara *and* See *Cases*, 1967 SUP. CT. REV. 1, 13-17.

[9]392 U.S. at 21.

probable cause to arrest or search, was felt by the court capable of affording protection against entrenchment of constitutionally protected rights by officials acting on nothing more than inarticulate hunches.[10] Thus, while the *Terry* Court refused to rule that all seizures were governed by the warrant clause,[11] it also stated that the lesser standard of reasonableness did not afford a basis for rejecting the traditional fourth amendment requirement that intrusions be predicated on specific and articulable facts.[12]

Realizing that an investigative stop must be supported by a factual basis, the question arises as to what type or quantum of facts must exist before a stop becomes reasonable. The decisions in *Terry* and *Adams v. Williams*[13] shed considerable light on the issue. In *Terry,* the officer personally observed the conduct justifying the intrusion. Similarly, in *Adams,* the investigating officer had information that an identified person was committing a

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[10]*Id.* at 22.

[11]While the Court placed emphasis on the reasonableness clause as the constitutional standard for testing investigative procedures it could have reached the same result by simply following its reasoning in *Camara* and *See, viz,* that the societal interests to be served in balance with the intrusion occasioned by a stop justified a lowering of the probable cause necessary to justify such intrusions. This arguably would have been more consistent with the Court's traditional approach to fourth amendment questions, *i.e.,* testing of warrantless seizures and searches by the warrant clause so as to ensure that policemen could not act without a warrant under circumstances in which a warrant could not have been obtained from a judicial officer. *See,* Lafave, *Street Encounters and the Constitution:* Terry, Sibron, Peters *and Beyond,* 67 MICH. L. REV. 40, 53-56 (1968). The approach taken in *Terry* is defensible when it is realized that reasonableness erects an overall limit on searches and seizures of which probable cause is but one evidentiary standard by which such conduct is tested. *See* Ker v. California, 374 U.S. 23 (1963). *See also The Supreme Court, 1967 Term,* 82 HARV. L. REV. 1, 181 (1968).

[12]392 U.S. at 22. By bringing investigative stops within the circumspection of the fourth amendment the *Terry* Court not only recognized a valuable police tool but also signaled a potential end to attempts to place such practices outside the purview of courts wielding the awesome power of the exclusionary rule by a process of euphemistic labeling. LaFave, *supra* note 11, at 52. Nevertheless, this safeguard becomes meaningful only if courts resist the pressures to use "reasonableness" as a predicate to ignore the more substantive standards which have been formulated in order to reflect the values encompassed by the metaphoric wording of the proscription against "unreasonable" seizures. For a catalogue of cases in which courts have succombed to just such pressures, see Cook, *The Art of Frisking,* 40 FORDHAM L. REV. 789 (1972). Cook characterizes such decisions as "incredible." *Id.* at 798.

[13]407 U.S. 143 (1972).

crime.[14] In both cases, then, the factual complexes provided a basis for justifiable beliefs that criminal activity was afoot and that the stopped suspect was likely to be the perpetrator. There was, in short, a demonstrable nexus between the criminal conduct and the person stopped. Sensitivity to the factual complexes in *Terry* and *Adams* therefore supports the proposition that a stop is justified when the officer has reason to believe that a crime has been committed or is about to be committed and that the suspect is the perpetrator of the offense.[15] This proposition also finds support in that it serves to further the goal of subjecting stops to something more than a vague and subjective standard. This concern that fourth amendment rights not be relegated to subjective standards is at the forefront of fourth amendment jurisprudence, and thus cases should be read so as to further the goal of objectivity.[16] By requiring the articulation of facts connecting the detainee with conduct under investigation, the fear that a person can be seized arbitrarily, in the sense that subjectivity is the yardstick by which stops are constitutionally measured, is considerably assuaged.

In light of the above, the critical question presented by the facts in *Williams* was what facts known to the officers at the time

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[14]In *Adams*, the detaining officer received information that an individual seated in a nearby Oldsmobile had narcotics in his car and was carrying a gun somewhere on his waist. Based on these facts, the Court held it was reasonable to approach the individual and to reach for the gun when the suspect rolled down his window instead of opening the door as had been requested.

Adams arguably extended *Terry* beyond its author's intended scope in two ways. First, it extended the right to stop to conventional possessory crimes and thus compelled a rejection of the theory that *Terry* was limited to cases in which violent crime was in the offing. Adams v. Williams, 407 U.S. 143, 152 (1972) (Brennan, J. dissenting). Secondly, *Adams* lessened the standards by which the credibility of an informant and the reliability of his tip are to be tested. 407 U.S. at 157. For a discussion of these arguments, see *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 171 (1971). *See also* Cook, *The Art of Frisking*, 40 FORDHAM L. REV. 789 (1972); Comment, *Stop and Frisk*, 63 NW. L. REV. 837 (1969); Note, *The Limits of Stop and Frisk—Questions Unanswered by* Terry, 10 ARIZ. L. REV. 419 (1968).

Granting that *Adams* abandoned some of the previously perceived limits on the right to stop and frisk, the Court in finding the conduct reasonable stressed the officer's knowledge that a crime was likely to be taking place and that a particular defendant was committing the crime. 407 U.S. at 144-45.

[15]LaFave, *supra* note 11, at 75.

[16]*Id.* at 73. That *Terry* was not intended to lessen the requirement of testing police conduct by objective standards is made quite clear by Chief

of the stop justified their conclusion that the stopped defendant was likely to have committed the robbery. It was precisely this question with which neither of the majority authors dealt when they simply labeled the stop reasonable. Rather than face this issue, the majority supported its reasonableness finding by presenting a series of arguments which in essence justified the stop on the basis of society's interest in detecting crime. As such, the opinions virtually ignore the individual's right to be free of even a limited intrusion such as a stop absent a factual justification and effectively insulate police conduct from fourth amendment scrutiny.

Chief Justice Arterburn, joined by Justice Givan, first cited Justice Jackson's dissent in *Brinegar v. United States*[17] for the proposition that the officers could have erected a roadblock in order to apprehend the fleeing suspects. Apparently, his theory was that since a roadblock would have been constitutionally reasonable, an individual stop is equally reasonable. This argument is objectionable for two reasons. It fails primarily because the Chief Justice was unable to direct us to any cases save automobile inspection stops which support his proposition that roadblocks are constitutionally permissible. On this point, Justice DeBruler in dissent was more forthright when he concluded that such indiscriminate dragnet procedures as those proposed by the Chief Justice were condemned, not supported, by precedent.[18] Secondly, the Chief Justice failed to deal with the fact that Jackson in *Brinegar* was not arguing in favor of vehicle stops on suspicion, but rather was condemning such police behavior. His roadblock example is cited as a situation in which he might strive to justify seizures on suspicion.[19]

The Chief Justice next offered the opinion that it may be constitutionally valid to detain an identifiable group when one of the group must have committed the crime. This theory can be squared with *Terry* in that when there is a definable group, there is a substantial likelihood of the stopped person's being the per-

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Justice Warren's opinion in *Terry* in which he cited precedent to the effect that the Court had consistently refused to sanction intrusions on constitutionally protected rights when the policemen acted on inarticulable hunches or in mere good faith. This same concern, he stated, mandated the application of an objective standard in *Terry*-type cases. 392 U.S. at 21-22.

[17]338 U.S. 160, 183 (1948).

[18]Williams v. State, 307 N.E.2d 457, 464 (Ind. 1974) (DeBruler, J., dissenting). *Cf.* Davis v. Mississippi, 394 U.S. 721 (1969).

[19]338 U.S. at 183 (Jackson, J. dissenting).

petrator of the offense.[20] The problem of applying this theory to the facts of *Williams* is readily apparent, *viz,* how did the officers know that the suspects would pass them? If there were only one road north this knowledge could be inferred, and coupled with the fact of the suspects' color, there might be a factual basis supportive of the stop in question. However, as the dissent pointed out there was more than one route north and, in fact, the defendants were stopped on a road other than the one the officers had determined to be the most likely escape route.[21] Thus, while having some merit, the Chief Justice failed to demonstrate how this theory applied to the instant case. Also, he did not attempt to define the limits of this theory so as to prevent its becoming a vehicle for totally indiscriminate detentions.[22]

Finally, the Chief Justice left us with language to the effect that in contemporary society the need for expedient law enforcement justifies a lenient interpretation of reasonableness.[23] This argument missed the point that in *Terry* and *Adams* the United States Supreme Court had already striven to accommodate this societal concern and in so doing made it incumbent on officers to act on more than mere hunches in forcing encounters.[24]

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[20]*Cf.* Gaskins v. United States, 260 A.2d 810 (D.C. Ct. App. 1970).

[21]Williams v. State, 307 N.E.2d 457, 462 (Ind. 1974) (DeBruler, J., dissenting).

[22]Justice DeBruler's dissent pointed out the potential for such abuses unless a group is readily definable and somehow limited in size when he posited the hypothetical of all persons in a department store being subjected to a search for recently stolen jewelry. *Id.* at 464.

[23]*Id.* at 461. Underlying the majority opinions seems to be the premise that because automobiles offer means for rapid escapes a strained application of the "reasonableness" standard is justified. *Id.* at 461, 468. While it is true that the United States Supreme Court has allowed warrantless searches of automobiles on an exigent circumstance theory, these cases do not support the majority's sub silentio rationale. Cars are afforded sui generis status for the purpose of validating searches effected after a valid arrest. This situation is markedly different from the position apparently taken by the majority in *Williams. See* Chambers v. Maroney, 399 U.S. 42 (1970); Carrol v. United States, 267 U.S. 132 (1925). For a concise discussion of the law pertaining to warrantless vehicle searches, see 23 VAND. L. REV. 1370 (1970).

[24]For a recent Indiana case giving proper credence to this mandate against seizures based on mere hunches, see Elliott v. State, 309 N.E.2d 454 (Ind. Ct. App. 1974). The court, in applying the "indicia of reliability" test established in Adams v. Williams, 407 U.S. 143 (1972), reversed the trial court's determination that a pat-down revealing a gun was reasonable. In reversing, Judge White, writing for the majority, reasoned that the initial stop was effected upon unreliable information and the subsequent search was constitutionally suspect. 309 N.E.2d at 458.

Though the concurring opinion of Justice Hunter attempted to justify the stop on less novel grounds than those of the Chief Justice, it also failed to broach the question of what facts supported the conclusion that the stopped car contained the suspects. Instead, Justice Hunter first pointed out that the automobile affords an attractive method of escape and listed several factors which must be considered in determining reasonableness.[25] He then concluded that the stop was reasonable because the car was in the range of possible flight and the suspects were known to be black.[26]

Justice Hunter cited several cases which he stated to be factually and theoretically supportive of the court's finding of reasonableness. An examination of these cases indicates otherwise. They basically fall into three groups: stops when the officers had specific identifying criteria,[27] classic *Adams*- and *Terry*-type stops,[28] and automobile stops for license checks.[29] Common to all these cases, except perhaps *United States v. Jackson*,[30] is that the officers either personally observed the conduct giving rise to the stop or had information tending to connect the suspect with the crime in question. Thus, unless Justice Hunter was

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[25]307 N.E.2d at 467-68.

[26]*Id.* at 468.

[27]United States v. Edwards, 469 F.2d 1362 (5th Cir. 1972) (stop of a car containing two Negroes, one wearing a bush hat, after officer personally observed the car speeding from a military post where two robberies had just occurred and one of the robbers had been described as wearing a bush hat); United States v. Miller, 452 F.2d 731 (10th Cir. 1971) (officers stopped a black car with a white door and no hood); United States v. Jackson, 448 F.2d 963 (9th Cir. 1971) (a stop four days earlier created cause to believe that same men had possibly just committed a bank robbery); United States v. Gazaway, 297 F. Supp. 67 (N.D. Ga. 1969) (officer stopped a newly painted blue, heavily laden 1961 Oldsmobile containing the defendant who was known to the officers as suspected of trafficking in illegal liquor by using a white 1961 Oldsmobile).

[28]United States v. Catlano, 450 F.2d 985 (7th Cir. 1971) (officers observed suspicious conduct of known burglar); Carpenter v. Sigler, 419 F.2d 169 (8th Cir. 1969) (personal observation of suspicious conduct by driver of out-of-county car in a business district at night); Ballou v. Massachusetts, 403 F.2d 982 (1st Cir. 1968) (informant gave information that suspect was at a particular place and armed); Bramlette v. Superior Court, 273 Cal. App. 2d 799, 78 Cal. Rptr. 532 (1950) (observation of panel truck not known to the stopping officer after he had observed the vehicle over an extended period of time).

[29]Palmore v. United States, 290 A.2d 573 (D.C. Ct. App. 1972) (stop of a rented Virginia licensed vehicle to see if it was properly leased.)

[30]448 F.2d 963 (9th Cir. 1971).

saying that skin color plus northerly flight is an adequate substitute for the more detailed identifying criteria common to these cases, it is difficult to fashion a rationale short of subterfuge for his citing these cases. If he was adopting the proffered rationale, then he was merely embracing the Chief Justice's theory than an identificable group can be subjected to seizure for purposes of investigating crime. However, as pointed out above, this theory requires some method of limiting the group to a manageable size in order to prevent the procedure from approaching dragnet dimensions.

Admittedly, the *Jackson* case is more difficult to distinguish from the instant case. There, the officers stopped and questioned three black men proceeding east from a point where a liquor store robbery had taken place. This stop produced nothing. However, four days later a bank robbery occurred and the description of the perpetrators and their car met the description of the previously stopped car. The three men questioned earlier were the bank robbers. While ruling that the original stop was reasonable, the *Jackson* court alternatively held that even if unreasonable, the lapse of time and the innocuousness of the information obtained thereby did not warrant a finding that the subsequent seizures were tainted.[31] Thus, by virtue of this alternative holding, it cannot be said that *Jackson* squarely supports stops when black persons are observed heading toward a black section of town. Yet, even assuming it does, the problem of distinguishing this situation from an arbitrary dragnet is still left unanswered by the *Jackson* court and by Justice Hunter's opinion.

In *Terry*, the Supreme Court recognized the need to accommodate the societal interests of crime prevention and detection with the individual's right to be free of arbitrary invasions of privacy. In striking this compromise, the Court gave great weight to the need for swift affirmative police action when faced with criminal conduct. Nevertheless, the Court explicitly rejected the argument that fourth amendment standards were not applicable to such intrusions. Rather, the Court inveighed against the type of wholesale emasculation of constitutionally protected rights which would attend such a holding.[32] By failing to place upon police the fundamental requirement of reproducing facts showing a substantial possibility that Williams was connected with the criminal conduct under investigation, the Indiana Supreme Court has given its imprimatur to just this type of pernicous emasculation.

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[31] *Id.* at 970.

[32] 392 U.S. at 21.

LEADING ARTICLES AND COMMENTS—AUTHORS

LEADING ARTICLES AND COMMENTS—TITLES

NOTES—TITLES

Page references in bold-faced type are to Leading Articles and Comments. Page references in italics are to Notes. Page references in plain type are to Recent Developments.

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